

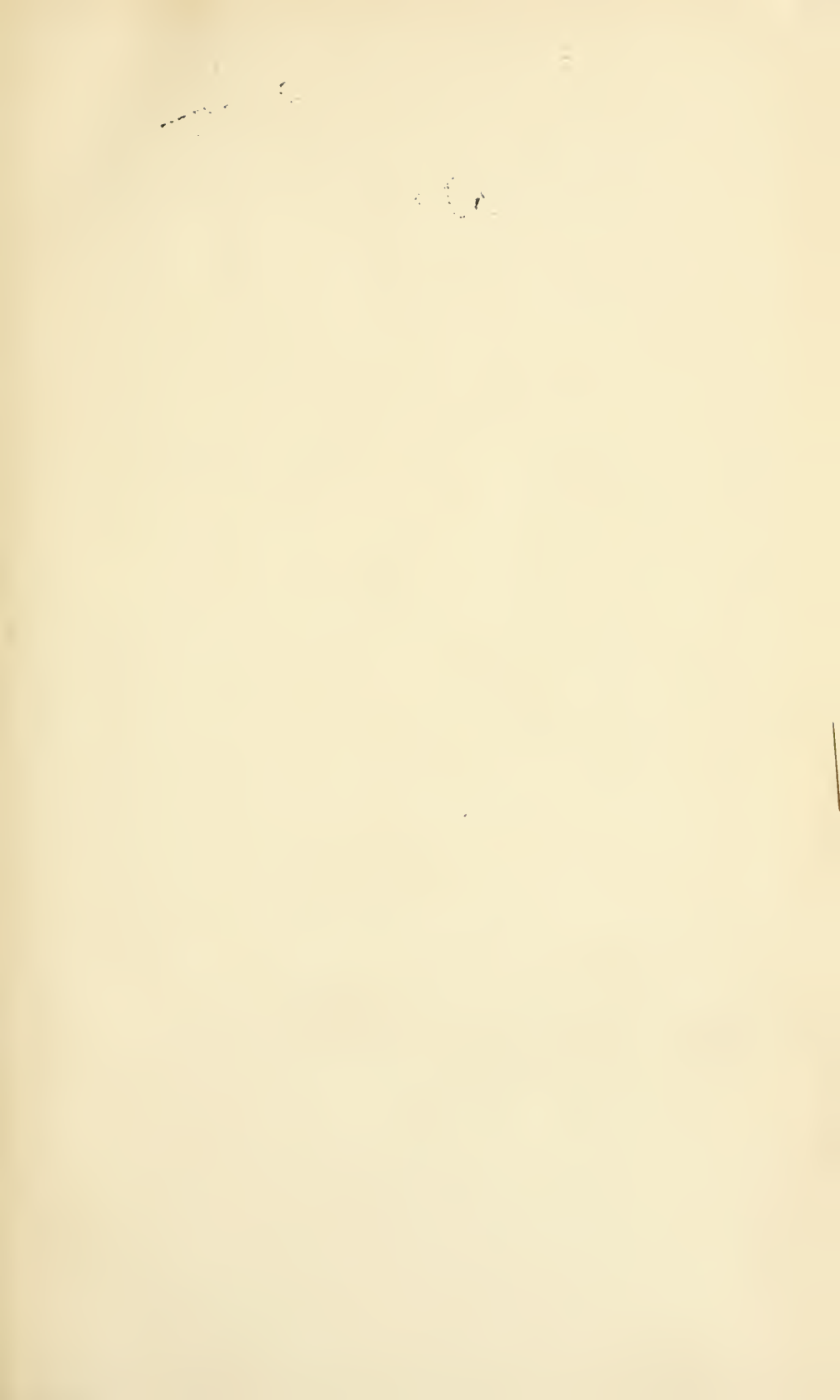
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THE LAW
OF
DECEDENTS' ESTATES
INCLUDING WILLS

Woerner, John Gabriel

THE LAW
OF
DECEDENTS' ESTATES
INCLUDING WILLS

AN ABRIDGEMENT FOR THE USE OF LAW STUDENTS
OF J. G. WOERNER'S GREAT TREATISE FOR
PRACTITIONERS ON "THE AMERICAN
LAW OF ADMINISTRATION"

EDITED BY
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WASHINGTON UNIVERSITIES

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PREFACE.

THIS book, specially designed for use as a text-book in law schools, is an abridgment and condensation into a single volume of Judge J. G. Woerner's monumental work on "The American Law of Administration." The editors, in lecturing upon the subject of wills and administration of decedents' estates, respectively in the law departments of Washington and St. Louis Universities, found no suitable text-book for students covering this field, which is of such practical and growing importance in a law course. The best plan devised was to lecture from Judge Woerner's book. But that great treatise is adapted to the needs of the practising lawyer and the courts, not to students. Though containing the fundamentals necessary to a proper understanding of the subject by the student, it contains also a tremendous amount of matter, nicety of detail, and citation of authorities, all of which is indispensably valuable to the practitioner, but is only a source of confusion to the beginner. In the light of their experiences in teaching this subject, these editors therefore conceived the idea of eliminating all matter not essential from the elementary viewpoint, and otherwise so modifying the main treatise as to make it of special adaptation to the needs of the beginner and properly to ground him in this field of the law.

The citation of cases is limited to a few which illustrate the principles involved or mark the development of the law upon this live and growing subject. The main work and the present abridgment are not competitive; each performs a separate

and independent function — the former is for the lawyer, the latter for the learner. The active practitioner should of course consult the main work for the authorities, details, and statutory references which are necessary in actual practice. But for the acquisition of the essentials necessary to a thorough understanding of the subject by the student, the editors trust that this abridgment will supply a much-felt demand.

WM. F. WOERNER.

F. A. WISLIZENUS.

ST. LOUIS, May, 1913.

TABLE OF CONTENTS.

| | |
|--------------------------------|-----------|
| Preface | PAGE v |
| Table of Cases Cited | xxxi |

INTRODUCTION.

OF THE NATURE OF PROPERTY AND THE PRINCIPLE DETERMINING ITS DEVOLUTION.

CHAPTER I.

OF PROPERTY IN GENERAL.

| | |
|-----------------------------------|---|
| § 1. Nature of Property | 1 |
| § 2. Nature of Law | 2 |

CHAPTER II.

EFFECT OF THE FEUDAL SYSTEM IN AMERICA.

| | |
|--|---|
| § 3. Feudal Influences | 3 |
| § 4. Modified in England by Statutes | 3 |
| § 5. Incongruity of the Rule in America | 4 |
| § 6. Function of Special Courts for Administration | 5 |

TITLE ONE.

OF THE DEVOLUTION OF PROPERTY ON THE DEATH OF ITS OWNER.

PART I.

Of the Devolution as Determined by the Act of the Owner.

BOOK ONE.

OF TESTAMENTARY DISPOSITION OF PROPERTY.

| | |
|--|---|
| § 7. What is Disposable | 7 |
| § 8. Disposition by Will or in Case of Intestacy | 7 |

CHAPTER III.

OF THE EXTERNAL LIMITS PLACED UPON TESTAMENTARY CAPACITY.

| | PAGE |
|--|------|
| § 9. The Right to make a Will | 8 |
| § 10. The Right to will Realty at Common Law | 8 |
| § 11. Testamentary Capacity | 9 |
| § 12. Aliens | 9 |
| § 13. Infants | 11 |
| § 14. Married Women | 12 |

CHAPTER IV.

INCAPACITY ARISING FROM MENTAL DISABILITIES.

| | |
|--|----|
| § 15. Degree of Mental Vigor Requisite to make a Will | 13 |
| § 16. Incapacity of Idiots, Imbeciles, Deaf, Dumb, and Blind | 14 |
| § 17. Lunatics | 15 |
| § 18. Presumption of Sanity | 16 |
| § 19. Presumption of Continuance of Proved Insanity — Lucid Intervals | 17 |
| § 20. Opinions of Non-experts as to Sanity | 17 |
| § 21. Incapacity in Consequence of Force, Fraud, or Intimidation . | 18 |
| § 22. Incapacity arising from Undue Influence | 18 |
| § 23. Presumption against Legacies to Fiduciary Advisers | 20 |
| § 24. Presumption as to Seamen's Wills | 20 |
| § 25. Partial Avoidance of Will by Undue Influence | 20 |

CHAPTER V.

FORM, EXECUTION, AND ATTESTATION OF WILLS.

| | |
|---|----|
| § 26. The Will is Ambulatory | 22 |
| § 27. Wills distinguished from Conveyance of Future Interests . . | 22 |
| § 28. Conditional Wills | 23 |
| § 29. Joint and Mutual Wills | 24 |
| § 30. Joint Wills as Contracts | 24 |
| § 31. Separate Wills in Pursuance of Contract | 25 |
| § 32. Contracts to make Particular Provision by Will | 26 |
| § 33. No Formality as to Will's Contents | 26 |
| § 34. Nor as to Writing Material or Language | 27 |
| § 35. The Signature | 27 |
| § 36. Attestation | 29 |
| § 37. Change in Law as to Testamentary Formalities | 30 |
| § 38. Competency of Attesting Witnesses | 31 |
| § 39. Holographic Wills | 32 |
| § 40. Nuncupative Wills | 33 |
| § 41. Formal Requisites for Nuncupative Wills | 33 |
| § 42. Wills of Soldiers and Mariners | 35 |
| § 43. Codicils | 35 |

CHAPTER VI.

OF THE REVOCATION OF WILLS.

| | PAGE |
|--|------|
| § 44. Methods of Revocation | 37 |
| § 45. Revocation by Cancelling, etc. | 37 |
| § 46. Dependent Relative Revocation | 39 |
| § 47. Partial Revocation by Cancelling | 39 |
| § 48. Revocation by Subsequent Will | 40 |
| § 49. Revival of a Prior Will by Revocation of a Later Will | 41 |
| § 50. What Property passes Under Will | 42 |
| § 51. Revocation by Inconsistent Disposition of the Testamentary Gift | 43 |
| § 52. Revocation by Marriage of Feme Sole | 43 |
| § 53. Revocation by Marriage of Males and Birth of Issue | 43 |
| § 54. Consequence of Failure to provide for Issue | 45 |
| § 55. Republication of Wills | 45 |

BOOK TWO.

OF GIFTS EXECUTED IN ANTICIPATION OF IMMEDIATE
DEATH.

CHAPTER VII.

DONATIONES MORTIS CAUSA.

| | |
|--|----|
| § 56. Definition of the Term | 47 |
| § 57. Apprehension of Death | 48 |
| § 58. Delivery of the Thing Given | 48 |
| § 59. Parting with Control | 49 |
| § 60. Delivery to Person other than Beneficial Donee | 50 |
| § 61. Revocation by the Living Donor | 50 |
| § 62. Revocation by Law | 51 |
| § 63. Liability of the Gift to Donor's Creditors | 51 |
| § 64. Validity of the Gift as against the Donor's Family | 51 |

PART II.

Of the Devolution by Operation of Law.

CHAPTER VIII.

DESCENT AND DISTRIBUTION OF PROPERTY OF INTESTATES.

| | |
|---|----|
| § 65. Principles Governing Distribution | 53 |
| § 66. Sources of American Law of Descent and Distribution | 54 |
| § 67. The Degrees of Relationship | 54 |

| | PAGE |
|--|------|
| § 68. Collateral Relationship under Canon and Civil Law | 55 |
| § 69. Representation | 55 |
| § 70. Statutory Modification of System of Distribution | 57 |
| § 71. Heirs of the Half Blood | 58 |
| § 72. Posthumous Children | 58 |
| § 73. Adopted Children | 59 |
| § 74. Illegitimate Children | 60 |
| § 75. Aliens as Heirs | 61 |
| § 76. Ancestral Estates | 61 |
| § 77. Disinheritance of Heir or Devisee who kills Ancestor | 62 |
| § 78. What Law governs Descent and Distribution | 63 |

CHAPTER IX.

PROVISIONAL ALIMONY OF THE FAMILY.

| | |
|---|----|
| § 79. Nature of Allowance to Family | 64 |
| § 80. The Extent and Mode of Allowance | 65 |
| § 81. Rules governing the Amount of the Allowance | 65 |
| § 82. To what Extent Liberality should govern the Court | 66 |
| § 83. The Allowance with Respect to Solvency or Insolvency of the Estate | 66 |
| § 84. Separate Property of the Widow affecting the Allowance | 66 |
| § 85. The Will as barring the Allowance | 67 |
| § 86. How affected by Marriage Settlements | 67 |
| § 87. How affected by Liens or Preferred Debts of the Decedent | 68 |
| § 88. When the Allowance takes Effect | 68 |
| § 89. What constitutes a Family | 69 |
| § 90. Allowance to Widow Alone | 69 |
| § 91. Allowance to the Children Alone | 70 |
| § 92. Out of what Property to be Allowed | 70 |
| § 93. Time and Procedure to obtain the Allowance | 71 |
| § 94. Additional Allowance | 72 |
| § 95. What Law governs | 72 |
| § 96. Scope of the Subject | 72 |

CHAPTER X.

EXEMPTION OF THE HOMESTEAD.

| | |
|--|----|
| § 97. Nature of the Homestead Right of the Surviving Family | 74 |
| § 98. What Tenement constitutes the Homestead | 75 |
| § 99. Homestead Rights of the Widow | 76 |
| § 100. The Homestead as affected by the Widow's Dower | 77 |
| § 101. The Widow's Right to sell the Homestead | 77 |
| § 102. Abandonment or Divorce affecting Homestead | 77 |
| § 103. Homestead Rights of Minor Children | 78 |
| § 104. Homestead Rights of Widow and Children as affected by Encumbrances | 79 |

TABLE OF CONTENTS.

xi

| | PAGE |
|---|------|
| § 105. Homestead Rights as affected by Inconsistent Disposition of the Estate by the Deceased Owner | 79 |
| § 106. Homestead Rights as affected by Administration | 80 |
| § 107. Procedure in Probate Court in Setting out the Homestead | 81 |
| § 108. The Rights and Burdens connected with Enjoyment of the Homestead | 81 |
| § 109. What Law controls | 82 |

CHAPTER XI.

DOWER.

| | |
|--|----|
| § 110. Dower in Realty | 83 |
| § 111. Dower in Personalty | 83 |
| § 112. Election between Dower and Devise | 84 |

CHAPTER XII.

PARTNERSHIP ESTATES.

| | |
|--|----|
| § 113. Results of Death of a Partner at Common Law | 88 |
| § 114. Results of Death of a Partner in Equity | 88 |
| § 115. The Right of Surviving Partners to prefer Creditors | 89 |
| § 116. Surviving Partners Continuing the Business | 89 |
| § 117. Continuing the Interest of Deceased Partner in Business | 90 |
| § 118. Rights of Partnership Creditors | 92 |
| § 119. Rights of Representatives of the Deceased Partner | 93 |
| § 120. Distribution of Partnership Effects | 93 |
| § 121. Good Will of Partnership | 94 |
| § 122. The Real Estate of the Partnership | 95 |
| § 123. History of the Missouri Statute as Typical of Modern Partnership Administration | 97 |

CHAPTER XIII.

ESCHEATS.

| | |
|--|-----|
| § 124. Devolution of Property in Default of Heirs | 99 |
| § 125. Escheat at Common Law | 100 |
| § 126. Escheats under the Statutes of the Several States | 100 |
| § 127. Need of Inquest of Office under Statutes | 101 |
| § 128. An Official as Representative of the State | 101 |
| § 129. Escheated Estate Subject to Trusts | 101 |
| § 130. Subsequent Recovery by Heir from the State | 102 |
| § 131. Administration of Escheated Estates | 102 |

TITLE TWO.

OF THE INSTRUMENTALITIES EFFECTING THE DEVOLUTION.

| | PAGE |
|--|------|
| § 132. Tribunals and Officers employed by the Law to accomplish the Devolution | 103 |

PART I.

Of the Tribunals Controlling the Administration of the Estates of Deceased Persons.

CHAPTER XIV.

PROBATE POWERS AS EXISTING AT COMMON LAW UNDER ENGLISH STATUTES.

| | |
|--|-----|
| § 133. Origin of the Ecclesiastical Jurisdiction over Probate of Wills | 104 |
| § 134. Origin of Administration in England | 105 |
| § 135. Powers of Ecclesiastical Courts in England | 106 |
| § 136. Probate Jurisdiction in Other English Courts | 108 |

CHAPTER XV.

NATURE OF PROBATE COURTS IN AMERICA.

| | |
|--|-----|
| § 137. Origin of Probate Courts in America | 110 |
| § 138. American Statutes the only Source of Probate Powers in the States | 111 |
| § 139. Their Dignity as Courts | 112 |
| § 140. Their Powers as Judicial Tribunals | 113 |
| § 141. Conclusiveness of their Judgments in Collateral Proceedings | 113 |
| § 142. How far Probate Courts may correct their Judgments | 116 |
| § 143. Entering Judgment nunc pro tunc | 116 |
| § 144. Proceeding in Rem and in Personam | 117 |
| § 145. Method of Procedure in Probate Courts | 119 |

CHAPTER XVI.

OF THE SUBJECT-MATTER WITHIN THE JURISDICTION OF PROBATE COURTS.

| | |
|---|-----|
| § 146. Scope of the Jurisdiction | 121 |
| § 147. Jurisdiction as limited to the Devolution of Property on the Owner's Death | 121 |
| § 148. Liabilities arising from Administration | 122 |
| § 149. Adjudication of Claims against the Deceased | 123 |
| § 150. Incidental Powers conferred by Necessary Implication | 123 |

TABLE OF CONTENTS.

xiii

| | Page |
|---|------|
| § 151. Power to construe Wills in Probate Court | 123 |
| § 152. Construing Wills in Equity | 124 |
| § 153. Exclusive and Concurrent Jurisdiction | 125 |
| § 154. Probate Jurisdiction of Federal Courts | 126 |

CHAPTER XVII.

DOMICILIARY AND ANCILLARY JURISDICTION.

| | |
|---|-----|
| § 155. Authority of Representatives limited to the State granting it | 128 |
| § 156. Administration of Same Succession in Different Countries . | 128 |
| § 157. Jurisdiction over Property removed to Another Country after Owner's Death | 130 |
| § 158. Legal Status of Foreign Administrators | 131 |
| § 159. Validity of Voluntary Payment to Foreign Administrator . | 132 |
| § 160. Extra-territorial Validity of Title once vested | 132 |
| § 161. Statutory Authority of Foreign Executors and Administrators | 134 |
| § 162. Liability of Foreign Administrators | 134 |
| § 163. Procedure governed by the Law of the Forum | 135 |
| § 164. Payment of Debts and Distribution to Non-Residents . . . | 135 |
| § 165. Real Estate governed by the Lex Rei Sitae | 137 |

PART II.

Of the Office of Executors and Administrators.

CHAPTER XVIII.

NATURE OF THE TITLE VESTING IN EXECUTORS AND ADMINISTRATORS.

| | |
|---|-----|
| § 166. Conduit of the Inheritance | 139 |
| § 167. Distinction between Executors and Administrators | 139 |
| § 168. When the Title vests in the Executor, and when in the Ad- ministrator | 140 |
| § 169. Relation of the Appointment to the Time of Death | 141 |
| § 170. Title of Executors and Administrators in <i>Auter Droit</i> . . . | 142 |
| § 171. Power of Alienation | 142 |

CHAPTER XIX.

OF SPECIAL AND QUALIFIED ADMINISTRATORS.

| | |
|--|-----|
| § 172. Administrators <i>cum Testamento Annexo</i> | 143 |
| § 173. Administrators <i>de Bonis Non</i> | 143 |
| § 174. Public Administrators | 145 |
| § 175. Administrators <i>Pendente Lite</i> | 145 |
| § 176. Temporary and Limited Administration | 146 |

TITLE THREE.

OF THE DEVOLUTION TO THE LEGAL REPRESENTATIVES.

PART I.

Of the Estate without Official Representation.

CHAPTER XX.

WHAT MAY BE DONE BEFORE PROBATE OR GRANT OF LETTERS.

| | PAGE |
|--|------|
| § 177. To whom the Real and to whom the Personal Property descends | 149 |
| § 178. Authority of Executors before Grant of Letters Testamentary | 150 |
| § 179. Authority of Administrators before Grant of Letters | 150 |

CHAPTER XXI.

OF EXECUTORS DE SON TORT.

| | |
|---|-----|
| § 180. Extent of Doctrine of Executor de son Tort in America | 152 |
| § 181. Executor de son Tort — how constituted | 153 |
| § 182. The Liability of the Executor de son Tort | 154 |
| § 183. Effect of Appointment of Executor de son Tort upon his Previous Acts | 154 |

CHAPTER XXII.

OF THE NECESSITY OF OFFICIAL ADMINISTRATION.

| | |
|--|-----|
| § 184. Why Administration is Necessary | 156 |
| § 185. Administration not Necessary under Certain Circumstances in some States | 156 |

PART II.

Of the Induction to the Office of Executor and Administrator.

CHAPTER XXIII.

OF THE PRELIMINARIES TO THE GRANT OF LETTERS TESTAMENTARY AND OF ADMINISTRATION.

| | |
|---|-----|
| § 186. Local Jurisdiction to grant Letters Testamentary and of Administration | 159 |
| § 187. Jurisdiction over Estates of Deceased Non-Residents | 160 |

TABLE OF CONTENTS.

XV

| | PAGE |
|--|------|
| § 188. Claims for injury resulting in Death as Asset | 162 |
| § 189. What constitutes Domicile or Residence | 163 |
| § 190. Proof of Death | 164 |
| § 191. Administration on the Estates of Living Persons | 165 |
| § 192. Administration on Estates of Absent Persons | 166 |

CHAPTER XXIV.

OF THE PROBATE OF THE WILL.

| | |
|--|-----|
| § 193. Necessity for Probate | 167 |
| § 194. Validity of Probate in Probate Courts | 167 |
| § 195. Production of the Will for Probate | 167 |
| § 196. Jurisdiction for Probate in Common and Solemn Form | 169 |
| § 197. Jurisdiction over Probate of Lost Wills | 169 |
| § 198. Method of Proof in Common Form | 169 |
| § 199. The Probate in Solemn Form | 171 |
| § 200. Contest of Probate | 171 |
| § 201. Proof when Testimony of Subscribing Witness cannot be obtained | 173 |
| § 202. Witnesses disqualified by Interest | 174 |
| § 203. Proof of the Testator's Sanity | 175 |
| § 204. Proof of Lost Wills | 175 |
| § 205. Proof of Wills in Part | 177 |
| § 206. Probate in Fac-simile | 178 |
| § 207. Testator's Declarations as Evidence in Probate of Will | 179 |
| § 208. Admissions by Beneficiaries under Will | 180 |
| § 209. Wills Proved in Foreign Jurisdiction | 181 |
| § 210. Revocation of Probate | 183 |
| § 211. Effect of Probate | 184 |

CHAPTER XXV.

OF THE GRANT OF LETTERS TESTAMENTARY.

| | |
|---|-----|
| § 212. How the Executor is Constituted | 186 |
| § 213. Residence as Qualification of Executor | 187 |
| § 214. Infancy as disqualifying Executor | 187 |
| § 215. Coverture as disqualifying Executrix | 187 |
| § 216. Mental Incapacity, Immorality, and other Disqualifications for Executorship | 188 |
| § 217. Acceptance or Refusal of Executorship | 189 |

CHAPTER XXVI.

LETTERS OF ADMINISTRATION.

| | |
|--|-----|
| § 218. Principles governing the Grant of Letters of Administration | 191 |
| § 219. Husband's Right to Appointment | 192 |

| | PAGE |
|--|------|
| § 220. Widow's Right to Appointment | 193 |
| § 221. Right of Next of Kin to Appointment | 194 |
| § 222. Right of Creditors to Appointment | 194 |
| § 223. Right of Public Administrator to administer | 195 |
| § 224. Disqualifications excluding from Appointment as Administrator | 195 |
| § 225. Considerations governing Discretion | 197 |
| § 226. Renunciation of the Right to Administer | 198 |
| § 227. Effect of Renunciation or Waiver | 199 |
| § 228. Administrators cum Testamento Annexo | 200 |
| § 229. Administration of Estates of Non-Residents | 201 |
| § 230. Administrators de Bonis Non | 202 |
| § 231. Administrators with Limited Powers | 202 |

CHAPTER XXVII.

OF THE ADMINISTRATION BOND.

| | |
|---|-----|
| § 232. Origin of the Law requiring Administration Bonds | 203 |
| § 233. Bonds of Executors | 203 |
| § 234. Power of Court to order Bond | 204 |
| § 235. Circumstances rendering Bond Necessary | 204 |
| § 236. Invalidity of Administration without Bond | 205 |
| § 237. When Additional Bond may be ordered | 205 |
| § 238. Nature of Liability of Sureties | 206 |
| § 239. Ordering Further Bond | 206 |
| § 240. Contribution between Different Sureties in the Same Estate | 208 |
| § 241. Bonds given in Successive Trustee Capacities | 208 |
| § 242. Technical Execution of the Bond | 209 |
| § 243. Amount of the Penalty | 209 |
| § 244. Joint or Separate Bonds | 210 |
| § 245. Approval and Custody of Bonds | 211 |
| § 246. Special Bonds | 211 |

CHAPTER XXVIII,

OF THE PROCEDURE IN OBTAINING LETTERS AND QUALIFYING FOR THE OFFICE.

| | |
|---|-----|
| § 247. The Petition for Grant of Letters, Testamentary or of Administration | 212 |
| § 248. Notice to Parties entitled to administer | 213 |
| § 249. Nature of the Proceeding | 214 |
| § 250. Nature of the Decree, and its Authentication | 215 |
| § 251. Oath of Office | 215 |

CHAPTER XXIX.

ON THE REVOCATION OF LETTERS TESTAMENTARY AND OF ADMINISTRATION.

| | PAGE |
|---|------|
| § 252. Conclusiveness of the Decree or Order granting Letters . . . | 216 |
| § 253. Jurisdiction to revoke Letters | 216 |
| § 254. Recall of Letters granted without Authority in the Court . . | 217 |
| § 255. Theory of Removal for Cause | 218 |
| § 256. What Misconduct justifies Revocation of Letters | 219 |
| § 257. Who may move for Revocation | 219 |
| § 258. Resignation of Executors and Administrators | 221 |
| § 259. Consequences of the Revocation of Letters | 221 |

PART III.

Of the Property to which the Title of Executors and Administrators Extends.

CHAPTER XXX.

OF PROPERTY IN POSSESSION.

| | |
|---|-----|
| § 260. Heirlooms not Personalty | 224 |
| § 261. Disposition of the Corpse | 224 |
| § 262. Joint Property | 225 |
| § 263. Real Estate | 225 |
| § 264. Chattels Real | 225 |
| § 265. Chattels Real of the Wife | 226 |
| § 266. Mortgages | 226 |
| § 267. Chattels Animate | 227 |
| § 268. Chattels Vegetable | 227 |
| § 269. Emblements | 227 |
| § 270. Fixtures, as between Heir and Personal Representative . . | 229 |
| § 271. Fixtures as between Devisee and Personal Representative . | 231 |
| § 272. Fixtures as between Personal Representative of Life Tenant and Remainderman | 231 |
| § 273. Separate Property of the Wife | 232 |
| § 274. Ante-Nuptial Settlements | 232 |
| § 275. Post-Nuptial Settlements | 233 |
| § 276. The Wife's Savings from Separate Trade, Pin-Money, Gifts, etc. | 233 |
| § 277. The Wife's Paraphernalia | 234 |

CHAPTER XXXI.

TITLE OF EXECUTORS AND ADMINISTRATORS TO CHOSSES IN ACTION.

| | |
|--|-----|
| § 278. Survival of Actions at Common Law | 235 |
| § 279. Reason of the Rule | 235 |

| | PAGE |
|--|------|
| § 280. American Statutes regulating the Survival of Actions . . . | 237 |
| § 281. Actions for Injury to Personalty | 237 |
| § 282. Actions concerning Realty | 238 |
| § 283. Actions for Injuries to the Person | 239 |
| § 284. Actions for Injuries resulting in Death do not lie at Common Law | 239 |
| § 285. Suit for Death Loss under Law of Other State | 241 |
| § 286. Property conveyed by Decedent in Fraud of Creditors . . . | 241 |
| § 287. Annuities and Rent Charges | 242 |
| § 288. Apprentices and Servants | 243 |
| § 289. Copyrights and Patents | 243 |
| § 290. Rents | 244 |
| § 291. Apportionment between Life Tenant and Remainderman . . | 245 |
| § 292. The Wife's Choses in Action | 245 |
| § 293. Actions accruing to the Representative, officially or individu- ally | 246 |

TITLE FOUR.

OF THE DUTIES OF THE PERSONAL REPRESENTATIVE IN RESPECT OF THE ESTATE.

PART I.

Of Acquiring Possession of the Estate.

CHAPTER XXXII.

WHAT CONSTITUTES ASSETS.

| | |
|---|-----|
| § 294. Meaning of the Term Assets | 249 |
| § 295. Assets not Possessed by the Decedent | 251 |
| § 296. Accretions, Interest, Rents, Profits | 252 |
| § 297. Property in Foreign Jurisdiction | 253 |
| § 298. Property lost through Administrator's Negligence as Assets . | 253 |
| § 299. Debts of Executors or Administrators as Assets | 254 |
| § 300. Property in Auter Droit not Assets | 255 |
| § 301. Legal and Equitable Assets | 255 |
| § 302. Personal and Real Assets | 256 |

CHAPTER XXXIII.

OF THE INVENTORY AND APPRAISAL.

| | |
|---|-----|
| § 303. Office and Necessity of the Inventory | 257 |
| § 304. Within what Time the Inventory must be filed | 257 |
| § 305. What Property must be inventoried | 258 |
| § 306. Details of the Inventory | 260 |

TABLE OF CONTENTS.

xix

| | PAGE |
|--|------|
| § 307. Indication of the Value of Assets | 261 |
| § 308. Appraisement of the Goods | 261 |

CHAPTER XXXIV.

DUTIES OF EXECUTORS AND ADMINISTRATORS IN TAKING CHARGE OF THE ESTATE.

| | |
|---|-----|
| § 309. Duty of Administrators to take Estate into Possession . . . | 263 |
| § 310. Right of Administrator paramount to Heir or Legatee . . . | 264 |
| § 311. Their Duty to prosecute and defend Actions pending by or against the Estate | 265 |
| § 312. Actions to recover or defend the Estate | 265 |
| § 313. Summary Proceedings to recover Assets | 266 |

PART II.

Of the Management of the Estate.

CHAPTER XXXV.

OF THE DUTIES OF EXECUTORS AND ADMINISTRATORS WITH RESPECT TO PERSONAL PROPERTY.

| | |
|---|-----|
| § 314. Compounding with Debtors | 269 |
| § 315. Arbitration | 270 |
| § 316. Protest and Notice respecting Negotiable Paper | 270 |
| § 317. Duties in Relation to the Contracts and Trade of the De- ceased | 272 |
| § 318. Preserving the Property | 274 |
| § 319. Taxes on Personalty | 275 |
| § 320. The Succession Tax | 277 |
| § 321. Transfer of Personalty by Personal Representative at Common Law | 279 |
| § 322. Restraint on Power of Sale by Statute | 280 |
| § 323. Sale of Perishable Property | 280 |
| § 324. Method and Notice of Sale | 281 |
| § 325. Terms and Method of Payment | 282 |
| § 326. Purchase of Personalty by the Executor or Administrator himself | 283 |
| § 327. Record and Report of the Sale | 283 |
| § 328. Duties in Respect to the Investment and Custody of Funds . | 283 |

CHAPTER XXXVI.

OF THE MANAGEMENT OF THE REAL PROPERTY.

| | |
|--|-----|
| § 329. Probate Control over Realty at Common Law and under Statutes | 287 |
|--|-----|

| | PAGE |
|---|------|
| § 330. I. The Common Law almost wholly abrogated | 288 |
| § 331. II. States giving Statutory Powers to the Personal Representative | 289 |
| § 332. III. Power over Realty through Probate Court | 290 |
| § 333. Power over Real Estate conferred by Will | 290 |
| § 334. Power given in a Will not following the Office of the Executor | 292 |
| § 335. Statutes Regulating the Power over Real Estate conferred by Will | 293 |
| § 336. Constructive or Equitable Conversion | 293 |
| § 337. Duties and Liabilities arising to Executors and Administrators in Respect of Real Estate | 295 |
| § 338. Power to Mortgage the Real Estate | 296 |

PART III.

Of the Privity among Executors or Administrators of the Same Estate.

CHAPTER XXXVII.

UNITY OF ESTATE AMONG EXECUTORS AND ADMINISTRATORS OF THE SAME DECEDENT.

| | |
|---|-----|
| § 339. Power of Co-executors to bind Each Other by Acts of Administration. | 298 |
| § 340. The Liability of one Co-executor or Co-administrator for the Acts of Another | 298 |
| § 341. Remedies in Protection of Co-administrators against Liability for One Another's Acts | 299 |
| § 342. Executor's Executor Representing the Executor's Testator | 300 |
| § 343. Succession in the administration at Common Law | 300 |
| § 344. Administration de bonis non under American Statutes | 302 |
| § 345. Privity between Successive Administrators | 303 |

TITLE FIVE.

OF THE PAYMENT OF DEBTS BY EXECUTORS AND ADMINISTRATORS.

| | |
|--|-----|
| § 346. Origin of the Common-law System of Paying Debts of Deceased Persons | 305 |
|--|-----|

PART I.

Of the Priority of Demands against the Estates of Deceased Persons.

| | |
|--|-----|
| § 347. Distinction between the Debts of the Decedent and Liabilities contracted by the Personal Representative | 306 |
|--|-----|

CHAPTER XXXVIII.

OF THE PAYMENT OF LIABILITIES ARISING AFTER THE DEATH OF THE
DECEDENT.

| | PAGE |
|---|------|
| § 348. Funeral Expenses allowable as Incidental to the Administration | 307 |
| § 349. Amount allowed for Funeral Expenses | 308 |
| § 350. What items are allowed as Funeral Expenses | 308 |
| § 351. Expenses of Last Illness when preferred to Debts | 309 |
| § 352. Expenses necessary in the Administration of the Estate | 309 |
| § 353. Provisional Alimony for the Surviving Family | 310 |

CHAPTER XXXIX.

OF THE PRIORITY OF DEBTS CREATED BY THE DECEDENT.

| | |
|---|-----|
| § 354. Priority of Debts at Common Law | 311 |
| § 355. Expenses of Funeral and Last Illness as Debts | 311 |
| § 356. Debts to the Government of the United States | 312 |
| § 357. Debts to the State and State Corporation | 312 |
| § 358. Debts owing in a Fiduciary Capacity | 313 |
| § 359. Judgments against the Decedent in his Lifetime | 313 |
| § 360. Debts by Specialty | 314 |
| § 361. Rent | 314 |
| § 362. Wages | 315 |
| § 363. Simple Contract Debts | 315 |

PART II.

Of the Common-law System of Paying Debts of Deceased Persons.

| | |
|---|-----|
| § 364. Payment of Debts according to their Priority | 316 |
|---|-----|

CHAPTER XL.

OF THE PAYMENT OF DEBTS AT COMMON LAW.

| | |
|---|-----|
| § 365. Common-law Preference among Creditors of Equal Degree | 317 |
| § 366. Right of Retainer at Common Law | 317 |
| § 367. Consequence of Paying Legatee before Notice of Debt | 318 |
| § 368. Defenses against Actions for Debts of the Deceased | 319 |
| § 369. Effect of Admissions and Promises by Executors or Administrators | 321 |
| § 370. Enforcing Judgments de bonis testatoris at Common Law | 322 |
| § 371. Liability of Executors and Administrators in Equity | 323 |

PART III.

Of the System of Paying Debts of Deceased Persons under American Statutes.

| | PAGE |
|--|------|
| § 372. Contrast between Common Law and American System . . . | 324 |
| § 373. Notice to Creditors of the Grant of Letters | 325 |

CHAPTER XLI.

OF THE EXHIBITION OF CLAIMS TO, AND THEIR ALLOWANCE BY, THE EXECUTOR OR ADMINISTRATOR.

| | |
|--|-----|
| § 374. Creditors required to exhibit Claims | 326 |
| § 375. What constitutes a Sufficient Exhibition | 326 |
| § 376. Time for the Exhibition of Claims | 328 |
| § 377. Affidavit of Creditors necessary | 328 |
| § 378. Allowance or Rejection of Claims by the Administrator . . . | 329 |

CHAPTER XLII.

OF ESTABLISHING CLAIMS AGAINST THE ESTATES OF DECEASED PERSONS.

| | |
|--|-----|
| § 379. When Claims may be established in Probate Court | 330 |
| § 380. What Actions and Defences are triable in Probate Courts . . | 331 |
| § 381. Claims against Estates of Deceased Married Women | 332 |
| § 382. Claims not matured | 332 |
| § 383. Contingent Claims | 333 |
| § 384. Claims of Executors and Administrators | 334 |
| § 385. Claims of Relatives | 334 |
| § 386. Notice to the Administrator of Claims to be established . . | 335 |
| § 387. Set-offs in Probate Courts | 336 |
| § 388. Claimants as Witnesses | 337 |

CHAPTER XLIII.

OF THE TIME WITHIN WHICH CLAIMS MUST BE ESTABLISHED.

| | |
|--|-----|
| § 389. Time of establishing Claims with Reference to their Rejection by the Administrator | 338 |
| § 390. Special Limitation of Time to establish Claims against Estates | 338 |
| § 391. Application of the General Statute of Limitations to Executors and Administrators | 339 |
| § 392. Application of the Statute of Non-claim | 340 |
| § 393. Effect of proving Claims after the Primary Period fixed there- for by Statute | 342 |

CHAPTER XLIV.

OF CLAIMS AGAINST ESTATES SPECIALLY ADMINISTERED AS INSOLVENT.

| | PAGE |
|---|------|
| § 394. Special Administration for Insolvency in some States . . . | 344 |
| § 395. How Estates are declared Insolvent | 344 |
| § 396. Special Administration of Insolvent Estates | 345 |
| § 397. Time within which Claims must be presented against Insolvent Estates | 346 |

CHAPTER XLV.

OF CLAIMS SECURED BY COLLATERAL.

| | |
|---|-----|
| § 398. Rights of Creditors holding Collateral Security to Assets of Insolvent Estates | 347 |
| § 399. Actions to foreclose Collateral Securities | 347 |

CHAPTER XLV A.

OF THE PAYMENT OF DEBTS WHEN ESTABLISHED.

| | |
|---|-----|
| § 400. Nature and Effect of the Allowance or Judgment establishing Claims | 349 |
| § 401. The Order or Decree to pay Debts | 350 |
| § 402. Enforcement of the Order or Decree to pay Debts | 351 |

TITLE SIX.

OF LEGACIES AND DEVISES.

| | |
|---|-----|
| § 403. Distinction between Devises and Legacies | 353 |
|---|-----|

PART I.

Of Ascertaining the Meaning of Wills.

CHAPTER XLVI.

OF THE GENERAL RULES APPLIED IN EXPOUNDING WILLS.

| | |
|--|-----|
| § 404. Ascertaining the Testator's Intention | 354 |
| § 405. Rule requiring the Several Parts of a Will to be construed together | 355 |
| § 406. General Intent Controlling the Particular Intent | 356 |
| § 407. Construction of terms repeated in the Will | 356 |
| § 408. Rule allowing Words and Limitations to be transposed, supplied, or rejected | 357 |

| | PAGE |
|--|------|
| § 409. Precatory Words | 357 |
| § 410. Estates by Implication | 358 |
| § 411. From what Period the Will speaks in Respect of the Law governing it | 359 |
| § 412. From what Period the Will speaks in Respect of the Testator's Intention | 360 |
| § 413. Extrinsic Evidence in Aid of Construction | 361 |
| § 414. Testamentary Donees as Classes | 363 |
| § 415. Classes designated by Technical Terms | 364 |

CHAPTER XLVII.

TESTAMENTARY DISPOSITIONS CONTROLLED BY PUBLIC POLICY.

| | |
|--|-----|
| § 416. Gifts for Immoral or Superstitious Purposes | 368 |
| § 417. Gifts prohibited by the Statute of Mortmain | 369 |
| § 418. Corporations as Testamentary Donees | 370 |
| § 419. Corporations as Donees in Trust | 371 |
| § 420. Rule against Perpetuities | 371 |
| § 421. Accumulation of the Income | 373 |
| § 422. Gifts to Charitable Uses | 374 |
| § 423. Force of the English Statute of Charitable Uses in America | 375 |
| § 424. Charitable Uses upheld where other Trusts fail for Indefiniteness | 375 |
| § 425. Charitable Trusts continue Indefinitely | 377 |
| § 426. The Doctrine of <i>Cy Pres</i> | 377 |
| § 427. Bequests for Masses for the Dead | 378 |

PART II.

Of Carrying Wills into Effect.

CHAPTER XLVIII.

LEGAL INCIDENTS AFFECTING DEVISES AND LEGACIES.

| | |
|--|-----|
| § 428. Lapse of Testamentary Gifts by the Death of the Donee before that of the Testator | 380 |
| § 429. Statutory Exceptions in Favor of Representatives of Deceased Legatees | 381 |
| § 430. The Doctrine of Lapse as affected by the Contingent or Vested Character of the Devise or Legacy | 382 |
| § 431. Devolution of Void and Lapsed Devises and Legacies | 382 |
| § 432. The Devolution of Void and Lapsed Devises and Legacies as affected by Statutes | 383 |
| § 433. Remainders, and Executory Devises and Bequests | 384 |
| § 434. Devises and Legacies on Condition | 386 |
| § 435. Repugnant Conditions | 387 |
| § 436. Spendthrift Trusts | 388 |

TABLE OF CONTENTS.

XXV

| | PAGE |
|---|------|
| § 437. Bequests Conditioned on Religious Qualifications | 388 |
| § 438. Condition for Separate Life of Married Couple | 389 |
| § 439. Condition against Disputing the Will | 389 |
| § 440. Conditions in Restraint of Marriage | 389 |
| § 441. Classification of Legacies | 391 |
| § 442. Cumulative, Repeated, and Substituted Legacies | 393 |
| § 443. Ademption and Satisfaction of Legacies by Act of the Testator | 393 |
| § 444. Legacies in Satisfaction of Debts | 394 |
| § 445. Ademption of Legacies given as Portions | 395 |
| § 446. Admissibility of Parol Evidence on Questions of Ademption | 396 |
| § 447. Statutory Provisions affecting Ademption or Satisfaction of Legacies | 396 |

CHAPTER XLIX.

OF THE SATISFACTION OF LEGACIES BY THE EXECUTOR.

| | |
|---|-----|
| § 448. Preference of Creditors over Legatees | 398 |
| § 449. Order in which Legacies abate | 398 |
| § 450. Executor's Assent to Devises and Legacies | 400 |
| § 451. Time for Paying or Delivering Legacies | 401 |
| § 452. Time for Paying Legacies fixed by Statutes | 402 |
| § 453. Payment of Bequests for Life with Remainder over | 402 |
| § 454. Resort to General Estate when Annuity Fund fails | 404 |
| § 455. Profits as Constituting Income for Life Tenant | 405 |
| § 456. Relative Rights of Life Tenants and Remaindermen to Dividends of Stock | 405 |
| § 457. Interest on Legacies | 406 |
| § 458. Interest when Time of Payment is fixed by the Will | 407 |
| § 459. Interest on Annuities | 408 |
| § 460. Persons competent to receive Payment of Legacies | 408 |
| § 461. The Doctrine of Election | 409 |
| § 462. Payment of the Residue | 410 |

TITLE SEVEN.

OF THE APPLICATION OF THE ASSETS FOR THE PAYMENT OF DEBTS AND LEGACIES.

PART I.

Of the Liability of Real Estate for the Debts of Deceased Persons.

CHAPTER L.

OF THE PROCEDURE IN OBTAINING THE ORDER OF SALE.

| | |
|---|-----|
| § 463. Nature of the Power to sell Real Estate for the Payment of Debts | 413 |
|---|-----|

| | PAGE. |
|---|-------|
| § 464. Sale by Executor under Power in Will | 414 |
| § 465. Who may apply for the Order to sell Real Estate | 414 |
| § 466. Within what Time Application may be made | 415 |
| § 467. Notice of the Application to Heirs and Devisees | 416 |
| § 468. What the Petition must show | 417 |
| § 469. Proof of the Existence of Debts | 418 |
| § 470. Proof of Insufficiency of the Personalty | 418 |
| § 471. Defence of Heir or Devisee to application for Sale | 419 |
| § 472. What Interest of the Decedent in Lands may be ordered to be sold | 419 |
| § 473. Of the Bond and Oath required of Executors and Administrators | 420 |
| § 474. The Order, License, or Decree to Sell | 420 |

CHAPTER LI.

OF THE SALE AND ITS CONSUMMATION.

| | |
|--|-----|
| § 475. Time of Selling | 422 |
| § 476. Notice or Advertisement of the Sale | 422 |
| § 477. Appraisement required before the Sale | 423 |
| § 478. Conducting the Sale | 424 |
| § 479. Report and Confirmation of the Sale | 425 |
| § 480. Payment of the Purchase-Money | 426 |
| § 481. The Deed of Conveyance | 427 |

CHAPTER LII.

OF THE CONSEQUENCES ATTENDING THE SALE.

| | |
|---|-----|
| § 482. Application of the Proceeds | 430 |
| § 483. Purchaser's Liability for Encumbrances | 431 |
| § 484. Purchaser's Liability to Dowress and Homestead Tenants | 432 |
| § 485. How Purchasers are affected by the Rule of Caveat Emptor | 433 |
| § 486. The Purchaser's Rights in Equity | 433 |
| § 487. Executors and Administrators as Purchasers | 435 |
| § 488. Validity of the Sale in Collateral Actions | 436 |

PART II.

Of the Relative Liability of Assets to Creditors and Legatees.

CHAPTER LIII.

OF MARSHALLING ASSETS FOR THE PAYMENT OF DEBTS AND LEGACIES.

| | |
|---|-----|
| § 489. Order of the Application of Funds Liable to the Payment of Debts | 438 |
|---|-----|

TABLE OF CONTENTS.

xxvii

| | PAGE |
|--|------|
| § 490. Charge of Debts on Real Estate | 440 |
| § 491. Charge of Legacies on Real Estate | 440 |
| § 492. Effect of Devise of Rents and Profits | 441 |
| § 493. Exoneration of the Personalty | 442 |
| § 494. Exoneration of Mortgaged Property | 442 |
| § 495. Statutory Modification of the Rule as to Devise of Encumbered property | 443 |
| § 496. Marshalling Assets in the Course of Administration | 444 |
| § 497. Marshalling Assets among Creditors, Legatees, Devisees, Heirs, and Distributees | 444 |

TITLE EIGHT.

OF ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

CHAPTER LIV.

OF THE COMMON LAW AND STATUTORY SYSTEM OF ACCOUNTING.

| | |
|---|-----|
| § 498. Accounting under the Older System of Administration | 445 |
| § 499. Statutes requiring Periodical Accounting | 446 |
| § 500. Rendering the Account and Passing upon it | 446 |
| § 501. Exclusive and Concurrent Jurisdiction over Administration Accounts | 447 |
| § 502. Conclusiveness of Partial Settlements | 448 |
| § 503. Nature of Final Settlements | 448 |
| § 504. Conclusiveness of Final Settlements | 449 |
| § 505. Setting aside Final Settlements in the Probate Court | 449 |
| § 506. Setting aside Final Settlements in Chancery | 449 |

CHAPTER LV.

OF THE DEBIT SIDE OF THE ACCOUNT.

| | |
|--|-----|
| § 507. What the Account must show | 451 |
| § 508. Inventoried Assets to be charged in the Account | 452 |
| § 509. What Interest Administrators are Chargeable with | 452 |
| § 510. Debts of Executor or Administrator to be charged | 453 |
| § 511. Rents and Proceeds of Real Estate Chargeable to the Executor or Administrator | 453 |

CHAPTER LVI.

OF THE CREDIT SIDE OF THE ACCOUNT.

| | |
|--|-----|
| § 512. What the Accountant may take Credit for | 455 |
| § 513. What Counsel Fees will be allowed | 455 |

| | PAGE |
|--|------|
| § 514. What Counsel Fees will not be allowed | 456 |
| § 515. Costs in Litigation Incident to Administration | 456 |
| § 516. The Executor's Expenses in Litigation concerning Estab- lishment of the Will | 457 |
| § 517. Disbursements in Respect of the Real Estate | 458 |
| § 518. The Allowance for Support of Widow and Children | 458 |
| § 519. Advance Payments to Distributees | 458 |
| § 520. Disbursements in Payment of Debts | 459 |
| § 521. Payments at Discount, or in Depreciated Currency | 459 |
| § 522. Credits for Difference between Inventoried and Actual Values | 460 |
| § 523. Interest on Advancements by the Executor or Administrator | 460 |

CHAPTER LVII.

COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

| | |
|---|-----|
| § 524. Commissions allowed by Statute and in the Absence of Statutes | 461 |
| § 525. Compensation in Cases of Maladministration | 461 |
| § 526. Upon what Property Commissions are allowable | 462 |
| § 527. Compensation for Extra Services | 463 |
| § 528. Compensation of Joint Executors or Administrators | 463 |
| § 529. Compensation to Successive Administrators | 464 |
| § 530. Bequest to Executor as Bearing on his Right to Commission . | 464 |
| § 531. Commissions where the same Person is Executor and Trustee | 465 |
| § 532. Credit for Commissions in the Administration Account . . . | 465 |

CHAPTER LVIII.

OF THE METHOD AND PROCEDURE IN ADJUDICATING THE ACCOUNT.

| | |
|---|-----|
| § 533. Devastavit | 467 |
| § 534. Accounting by Co-executors or Co-administrators | 467 |
| § 535. Accounting by Successive Administrators | 468 |
| § 536. Accounting for Assets received in Foreign Jurisdiction . . . | 468 |
| § 537. Compelling Final Settlement | 469 |
| § 538. Falsifications and Surcharges on Final Settlement | 469 |
| § 539. Verification and Evidence | 470 |
| § 540. Judgment on the Adjudication of the Account. | 470 |

CHAPTER LIX.

OF APPEALS FROM COURTS OF PROBATE.

| | |
|--|-----|
| § 541. Right of Appeal given by Statutes | 472 |
| § 542. Who may appeal | 472 |
| § 543. From what Decisions of Probate Courts Appeals are allowable | 472 |

TABLE OF CONTENTS.

xxix

| | PAGE |
|---|------|
| § 544. How Appeal is taken | 473 |
| § 545. Powers of the Probate Court after Appeal | 473 |
| § 546. Nature of the Trial in the Appellate Court | 474 |
| § 547. Nature of the Trial de Novo | 474 |

TITLE NINE.

OF THE CLOSE OF THE ADMINISTRATION.

PART I.

Of Distribution to Legatees and Next of Kin.

| | |
|---|-----|
| § 548. Duty of Probate Courts to order Distribution | 475 |
|---|-----|

CHAPTER LX.

OF ADVANCEMENTS.

| | |
|--|-----|
| § 549. Definition of Advancements | 476 |
| § 550. Distinction between Advancement and Ademption | 476 |
| § 551. Jurisdiction over Advancements of Realty and Personalty | 477 |
| § 552. To whom the Doctrine of Advancements applies | 477 |
| § 553. What constitutes an Advancement | 478 |
| § 554. Rights of Donees in Respect of Advancements | 478 |
| § 555. Computation of the Value of Advancements | 479 |
| § 556. How the Existence of Advancements may be shown | 480 |

CHAPTER LXI.

OF THE DECREE OR ORDER OF DISTRIBUTION.

| | |
|--|-----|
| § 557. Refunding Bonds | 481 |
| § 558. Parties to the Order of Distribution. Its Conclusiveness | 482 |
| § 559. Nature and Scope of the Decree | 482 |
| § 560. Rights of Assignees of Distributees | 483 |
| § 561. Set-off to Legacies and Distributive Shares | 484 |
| § 562. Distribution of Personalty by Law of Domicile | 484 |
| § 563. The Widow's Rights not affected by Remarriage or Prior Gift | 485 |
| § 564. The Share of a Deceased Distributee goes to his Personal Representative | 485 |
| § 565. Rights of Posthumous and Pretermitted Children | 485 |
| § 566. Distribution without Administration | 485 |
| § 567. Partial and Premature Distribution | 486 |
| § 568. Partition of Real Estate in Courts of Probate | 486 |
| § 569. Enforcing the Order to pay Legacies and Distributive Shares | 488 |
| § 570. Enforcement of Distribution under American Statutes | 489 |
| § 571. Disposition of Unclaimed Legacies and Distributive Shares | 489 |

PART II.

Of the Estate after Official Administration.

CHAPTER LXII.

OF THE STATUS OF EXECUTORS AND ADMINISTRATORS AFTER FINAL SETTLEMENT.

| | PAGE |
|---|------|
| § 572. Res Judicata as a Defence after Final Settlement | 491 |
| § 573. Duration of the Office at Common Law | 491 |
| § 574. The American Theory of the Duration of the office | 492 |
| § 575. Statutory Provisions for the Discharge of Executors and Administrators | 492 |

CHAPTER LXIII.

OF THE LIABILITY OF THE ESTATE AFTER FINAL SETTLEMENT.

| | |
|---|-----|
| § 576. Liability of Legatees and Distributees after Settlement to Creditors of Deceased at Common Law | 494 |
| § 577. Liability of Heir and Devisee at Common Law | 494 |
| § 578. Liability of Beneficiaries of Estate under Statutes | 494 |
| § 579. What Creditors can claim after Final Settlement | 494 |
| § 580. Extent of Liability of the Beneficiary of Deceased | 495 |
| § 581. The Creditor's Form of Remedy against Beneficiaries of Estate | 495 |
| INDEX | 497 |

TABLE OF CASES.

[REFERENCES ARE TO SECTIONS]

A.

| | SEC. |
|--|------|
| Allen <i>v.</i> Freeman, 96 Ky. 313 | 195 |
| Anschuetz <i>v.</i> Miller, 81 Pa. St. 212 | 412 |
| Avery <i>v.</i> Pixley, 4 Mass. 460 | 45 |

B.

| | |
|--|----------|
| Babb <i>v.</i> Reed, 5 Rawle, 151 | 422 |
| Baird <i>v.</i> Boucher, 60 Miss. 326 | 408 |
| Baker <i>v.</i> Brown, 18 Ill. 91 | 391 |
| Bank of Iron Gate <i>v.</i> Brady, 184 U. S. 665 | 279 |
| Barnum <i>v.</i> Baltimore, 62 Md. 275 | 437 |
| Barrett <i>v.</i> Choen, 119 Ind. 56 | 269 |
| Basket <i>v.</i> Hassell, 107 U. S. 602 | 59 |
| Bate <i>v.</i> Bate, 11 Bush, 639 | 528 |
| Blackstone <i>v.</i> Miller, 188 U. S. 189 | 319 |
| Blythe <i>v.</i> Hinckley, 127 Cal. 431 | 12 |
| Boardman <i>v.</i> Woodman, 47 N. H. 120 | 20 |
| Boyce <i>v.</i> City of St. Louis, 29 Barb. 650 | 419 |
| Brant's Will, 40 Mo. 266 | 493 |
| Bristol <i>v.</i> Washington Co., 177 U. S. 133 | 320 |
| Brown <i>v.</i> Fletcher, 210 U. S. 82 | 156 |
| Buck <i>v.</i> Beach, 206 U. S. 392 | 319 |
| Buckingham <i>v.</i> Morrison, 136 Ill. 437 | 453 |
| Bundy <i>v.</i> McKnight, 48 Ind. 502 | 15 |
| Byers <i>v.</i> McAuley, 149 U. S. 608 | 144, 154 |

C.

| | |
|--|-----|
| Carpenter <i>v.</i> Strange, 141 U. S. 87 | 156 |
| Chambers <i>v.</i> City of St. Louis, 29 Mo. 543 | 419 |
| Chase <i>v.</i> Redding, 13 Gray, 418 | 64 |
| Christ Hospital <i>v.</i> Grainger, 16 Sim. 83; s. c. 1 MacN. & G. 460 | 425 |
| Clinton <i>v.</i> Clinton, 223 Mo. 371 | 313 |
| Coggins' Appeal, 124 Pa. St. 19 | 420 |
| Colton <i>v.</i> Colton, 127 U. S. 300 | 409 |
| Copenhaver <i>v.</i> Copenhaver, 9 Mo. App. 200 | 69 |
| Cowan <i>v.</i> Mueller, 176 Mo. 192 | 399 |
| Crites, Estate of, 155 Cal. 392, 101 Pac. 316 | 218 |
| Cruce <i>v.</i> Cruce, 81 Mo. 676 | 509 |

| | SEC. |
|---|------|
| Cunnius v. School District, 198 U. S. 458 | 192 |
| Cutting v. Gilman, 41 N. H. 147 | 58 |

D.

| | |
|---|-----|
| Davis, <i>In re</i> , 106 Cal. 543 | 218 |
| Davis v. Krug, 95 Ind. 1 | 73 |
| Dawes v. Head, 3 Pick. 128 | 164 |
| Day v. Wallace, 144 Ill. 256 | 405 |
| Dellner v. Dellner, 141 Wis. 255, s. c. 124 N. W. 278 | 86 |
| Denise v. Denise, 37 N. J. Eq. 163 | 429 |
| Despard v. Churchill, 53 N. Y. 192 | 562 |
| De Valengin's Admr. v. Duffy, 14 Peters, 282 | 294 |
| Devone v. Fanning, 2 Johns. Ch. 252 | 487 |
| Dickson, <i>Ex parte</i> , 1 Sim. (N. S.) 37 | 437 |
| Doolittle v. Lewis, 7 John. Ch. 45 | 159 |
| Dowdale's Case, 6 Co. 47 | 297 |
| Dulaney v. Willis, 95 Va. 606 | 398 |

E.

| | |
|--|-----|
| Earp's Appeal, 28 Pa. St. 368 | 456 |
| Eaton v. Brown, 193 U. S. 411 | 28 |
| Edson v. Parsons, 155 N. Y. 555 | 31 |
| Elizalde v. Elizalde, 137 Cal. 634 | 294 |
| Elliott's Estate, 98 Mo. 379 | 551 |
| Evans, Estate of, 117 Mo. A. 629 | 218 |

F.

| | |
|---|-----|
| Farrar v. Dean, 24 Mo. 16 | 125 |
| Farrell v. O'Brien, 199 U. S. 89 | 154 |
| Farrill v. Roberts, 50 N. Y. 222 | 486 |
| Festorazzi v. St. Joseph's Church, 104 Ala. 327 | 427 |
| Fickle v. Snapp, 97 Ind. 289 | 379 |
| Finley v. King, 3 Peters, 376 | 434 |
| Fontain v. Ravenel, 17 How (U. S.) 369 | 424 |
| Foote v. Overman, 22 Ill. App. 181 | 269 |
| Forman's Will, 54 Barb. 274 | 17 |
| Foster v. Cook, 3 Bro. C. C. 346 | 412 |
| Freer, <i>In re</i> , 22 L. R. Ch. Div. 622 | 443 |
| French v. French, 14 W. Va. 458 | 28 |
| Fretwell v. McLemore, 52 Ala. 124 | 185 |

G.

| | |
|---|-----|
| Gass v. Wilhite, 2 Dana 170 | 416 |
| Gates v. Seibert, 157 Mo. 254 | 420 |
| Gibbons v. Mahon, 136 U. S. 549 | 456 |
| Gilkey v. Hamilton, 22 Mich. 283 | 169 |
| Gollnick's Estate (Minn.) 128 Northwestern, 492 | 78 |

TABLE OF CASES.
[References are to Sections]

xxxiii

| | Sec. |
|---|------|
| Gough <i>v.</i> Manning, 26 Md. 347 | 440 |
| Graham <i>v.</i> Burch, 47 Minn. 171 | 45 |
| Greenwood <i>v.</i> Greenwood, 178 Ill. 387 | 336 |
| Grice <i>v.</i> Randall, 23 Vt. 329 | 568 |
| Gunn <i>v.</i> Barry, 15 Wall. 610 | 109 |
| <i>v.</i> Thruston, 130 Mo. 339 | 556 |

H.

| | |
|---|-----|
| Haddock <i>v.</i> Boston & Maine R. R. Co., 146 Mass. 155 | 195 |
| Hart <i>v.</i> Soward, 12 B. Monr. 391 | 218 |
| Harvey <i>v.</i> Sullens, 46 Mo. 147 | 15 |
| Haydel <i>v.</i> Hurck, 72 Mo. 253 | 406 |
| Healy <i>v.</i> Toppan, 45 N. H. 263 | 453 |
| Hoban <i>v.</i> Piquette, 52 Mich. 346 | 16 |
| Hockaday <i>v.</i> Lynn, 200 Mo. 546 | 73 |
| Hoeffer <i>v.</i> Clogan, 171 Ill. 462 | 427 |
| Hoffman, Matter of, 143 N. Y. 327 | 320 |
| Hoke <i>v.</i> Herman, 21 Pa. St. 301 | 443 |
| Hope <i>v.</i> Wilkinson, 14 Lea, 21 | 489 |
| Howe <i>v.</i> Dartmouth, 7 Ves. 137 | 453 |
| Hunt <i>v.</i> Evans, 134 Ill. 496 | 410 |
| Hutchins <i>v.</i> St. Paul R. R., 44 Minn. 5 | 188 |

I.

| | |
|--|-----|
| Iowa Loan & Trust Co. <i>v.</i> Holderbaum, 86 Iowa, 1 | 464 |
|--|-----|

J.

| | |
|---|-----|
| Jackson <i>v.</i> Phillips, 14 Allen, 539 | 422 |
| Jellenek <i>v.</i> Huron Copper Co. 177 U. S. 1 | 187 |
| Johnson <i>v.</i> Hoff, 63 Minn. 296 | 369 |
| <i>v.</i> Turner, 29 Ark. 280 | 103 |
| <i>v.</i> Wallis, 112 N. Y. 230 | 160 |
| Jones <i>v.</i> Casler, 139 Ind. 382 | 204 |
| <i>v.</i> Clifton, 101 U. S. 225 | 275 |
| Jordan <i>v.</i> Hunnel, 96 Iowa, 334 | 173 |

K.

| | |
|--|-----|
| Kidd <i>v.</i> Johnson, 100 U. S. 617 | 289 |
| Kinney <i>v.</i> Keplinger, 172 Ill. 449 | 212 |
| Knott <i>v.</i> Stearns, 91 U. S. 638 | 72 |
| Kuhn <i>v.</i> Kuhn, 125 Iowa, 449 | 77 |

L.

| | |
|--|-----|
| Lackland <i>v.</i> Walker, 151 Mo. 210 | 426 |
| Leather Cloth Co. <i>v.</i> American Co., 11 H. L. 523 | 289 |
| Lewis <i>v.</i> Parrish, 115 Fed. (C. C. A.) 285 | 536 |

| | Sec. |
|--|------|
| Lily v. Hey, 1 Hare, 580 | 422 |
| Lloyd v. Fulton, 91 U. S. 479 | 275 |
| Lupton v. Lupton, 2 Johns. Ch. 614 | 449 |

M.

| | |
|--|----------|
| McCall v. Hampton, 98 Ky. 166 | 554 |
| McNally v. Haynes, 59 Tex. 583 | 485 |
| Maddox v. Maddox, 11 Grat. 804 | 437 |
| Magee v. O'Neil, 19 S. C. 170 | 437 |
| Mallory's Appeal, 62 Conn. 218 | 173 |
| Martin v. Roe, 8 Ad. & El. 14 | 53 |
| Michigan Trust Co. v. Ferry, 175 Fed. (C. C. A.) 667 | 255, 343 |
| Michoud v. Girod, 4 How (U. S.) 503 | 487 |
| Miller v. Hoover, 121 Mo. App. 568 | 187 |
| Mitchell v. Mitchell, 18 Md. 405 | 437 |
| Morgan v. Dodge, 44 N. H. 255 | 133 |
| Mulford v. Mulford, 40 N. J. Eq. 163 | 294 |

N.

| | |
|---|-----|
| New England Co. v. Woodworth, 111 U. S. 138 | 187 |
| Newkerk v. Newkerk, 2 Caines 345 | 435 |
| Norton v. Frecker, 1 Ark. 524 | 391 |
| Noyes Estate, 40 Mont. 190 | 39 |

O.

| | |
|--|-----|
| Obert v. Hammel, 18 N. J. L. 73 | 139 |
| O'Donnell v. Slack, 123 Cal. 285 | 261 |
| Orcutt v. Orms, 3 Paige 459 | 157 |
| O'Rear v. Crum, 135 Ill. 294 | 218 |
| Overby v. Gordon, 177 U. S. 214 | 156 |

P.

| | |
|--|-----|
| Page v. Culver, 55 Mo. App. 606 | 269 |
| v. Frazer, 14 Bush, 205 | 434 |
| Pastine v. Bonini, 166 Mass. 85 | 412 |
| Patton v. Grady, 184 U. S. 608 | 279 |
| Perry v. Strawbridge, 209 Mo. 621 | 78 |
| Pfluger v. Pultz, 43 N. J. Eq. 440 | 32 |
| Plumber v. Coler, 178 U. S. 115 | 320 |
| Powell v. Rich, 41 Ill. 466 | 269 |
| Pratt's Appeal, 117 Pa. St. 401 | 289 |
| Pulling v. Durfee, 85 Mich. 34 | 86 |

R.

| | |
|---|-----|
| Reinders v. Koppelman, 68 Mo. 482 | 73 |
| Richardson v. Busch, 198 Mo. 174 | 187 |
| Riggs v. Palmer, 115 N. Y. 506 | 77 |

TABLE OF CASES.
[References are to Sections]

XXXV

| | SEC. |
|--|------|
| Robbin <i>v.</i> Mueller, 114 Ill. 343 | 195 |
| Robbins <i>v.</i> Boulware, 190 Mo. 33 | 476 |
| Robinson <i>v.</i> Fair, 128 U. S. 53 | 568 |
| Rottenberry <i>v.</i> Pipes, 53 Ala. 447 | 106 |
| Rugg <i>v.</i> Rugg, 83 N. Y. 592 | 201 |

S.

| | |
|---|-----|
| Sargent <i>v.</i> Sargent, 168 Mass. 420 | 188 |
| Sawtelle <i>v.</i> Witham, 94 Wis. 412 | 424 |
| Schoenberger <i>v.</i> Lancaster, 28 Pa. St. 459 | 168 |
| Scholl, <i>In re</i> , 100 Wis. 650 | 414 |
| Schlottmann <i>v.</i> Hoffman, 73 Miss. 188 | 413 |
| Schouler, Petitioner, 134 Mass. 426 | 427 |
| Scott <i>v.</i> McNeal, 154 U. S. 34 | 191 |
| Schultz <i>v.</i> Pulver, 11 Wend. 361 | 309 |
| Security Co. <i>v.</i> Pratt, 65 Conn. 161 | 154 |
| Security Trust Co. <i>v.</i> Bank, 187 U. S. 211 | 154 |
| Shattuck <i>v.</i> Chandler, 40 Kan. 516 | 115 |
| Sherman <i>v.</i> Baker, 20 R. I. 446 | 427 |
| Simon's Estate, 158 Mich. 256 | 554 |
| Smith <i>v.</i> Bank, 5 Pet. 518 | 163 |
| Spaulding <i>v.</i> Suss, 4 Mo. App. 541 | 375 |
| Stagg <i>v.</i> Green, 47 Mo. 500 | 168 |
| State <i>v.</i> Joyce, 48 Ind. 310 | 408 |
| <i>v.</i> McGlynn, 20 Cal. 233 | 209 |
| <i>v.</i> Withrow, 141 Mo. 69 | 115 |
| Straat <i>v.</i> O'Neil, 84 No. 68 | 64 |
| Strode <i>v.</i> St. Louis Transit Co., 197 Mo. 616 | 284 |
| Sulz <i>v.</i> Ins. Ass'n, 145 N. Y. 563 | 187 |

T.

| | |
|---|----------|
| Thompson, <i>Ex parte</i> , 4 Bradf. | 42 |
| Thormann <i>v.</i> Frame, 176 U. S. 350 | 156, 186 |
| Throckmorton <i>v.</i> Holt, 180 U. S. 552 | 45, 207 |
| Travers <i>v.</i> Wallace, 93 Md. 512 | 415 |
| Tucker <i>v.</i> Harris, 13 Ga. 1 | 139 |
| Turner <i>v.</i> Am. L. & T. Co., 213 U. S. 257 | 20 |

U.

| | |
|---|-----|
| Underground <i>v.</i> Owsley, 176 Fed. (C. C. A.) 26 | 154 |
| U. S. Fidelity & G. Co. <i>v.</i> People, 44 Colo. 557 | 347 |
| U. S. <i>v.</i> Fisher, 2 Cr. 358 | 356 |
| United States <i>v.</i> Tyndale, 116 Fed. R. (C. C. A.) 820 | 124 |

V.

| | |
|--|-----|
| Vanderbilt <i>v.</i> Eidman, 196 U. S. 480 | 320 |
| Van Slooten <i>v.</i> Dodge, 145 N. Y. 327 | 294 |
| Vidal <i>v.</i> Girard, 2 How. (U. S.) 127 | 437 |

W.

| | SEC. |
|--|------|
| Walker <i>v.</i> Woolaston, 2 P. Wms. 576 | 175 |
| Waterhouse <i>v.</i> Churchill, 30 Colo. 415 | 566 |
| West <i>v.</i> Smith, 8 How. (U. S.) 402 | 526 |
| Weston <i>v.</i> Johnson, 48 Ind. 15 | 445 |
| Wild's Case Co. pt. 6, 17 | 414 |
| Wilkins <i>v.</i> Allen, 18 How (U. S.) 385 | 413 |
| <i>v.</i> Ellett, 9 Wall. 740 | 159 |
| Williams <i>v.</i> Edwards, 94 Mo. 447 | 388 |
| <i>v.</i> Williams, 1 Sim. (N. S.) 358. | 409 |
| Wilmerton <i>v.</i> Wilmerton, 176 Fed. (C. C. A.) 896 | 443 |
| Wing <i>v.</i> Angrave, 8 H. L. 183 | 190 |
| Wunderle <i>v.</i> Wunderle, 144 Ill. 40 | 12 |
| Wyman <i>v.</i> Halstead, 109 U. S. 654 | 159 |

Y.

| | |
|--|-----|
| Young Women's Christian Home <i>v.</i> French, 187 U. S. 401 | 190 |
|--|-----|

Z.

| | |
|---|-----|
| Zcisweiss <i>v.</i> James, 63 Pa. St. 463 | 416 |
|---|-----|

THE LAW OF DECEDENTS' ESTATES.

INTRODUCTION.

OF THE NATURE OF PROPERTY AND THE PRINCIPLES DETERMINING ITS DEVOLUTION.

CHAPTER I.

OF PROPERTY IN GENERAL.

§ 1. **Nature of Property.** — Property is the will of the owner realized in the thing or object. It is the will element that determines the acquisition of the thing — makes it property — either by application of labor in the transformation of the original elements of nature, or by concurrence of the will of him who has done this with that of the new owner, *i. e.*, by contract, or by both such methods. This realized will is the very essence of property, and having once attached, necessarily continues therein so long as the thing or object is property at all. During the life of the owner the law recognizes his right to use or dispose of his property according to his free or rational will (the law does not recognize but annuls capricious will). It can be lost or transferred to another only by what the law regards as the owner's free will. The consent (free will) of the original owner is a necessary element in the alienation of property and its acquisition by any successor. And the right to a rational alienation is an essential element of property.

Having been once realized in existing property, the will element thereof that is of its essence, is not destroyed or cancelled because of the owner's death, but inheres in his property and continues therein. The law still recognizes this will of the deceased owner by disposing of the property according to

his particular *will* (testament) if he chooses to make one; or if he does not, then according to what it assumes to be his rational will, under the laws of descent and distribution, which are in effect a universal will which the law substitutes or makes for the owner, and which he adopts and makes his own by dying intestate.¹

Out of this germ, including the legal determination of what is or is not the rational or free will of a decedent with reference to his property (for instance as affecting testamentary capacity, support of surviving family, payment of debts, etc.) grows the body of probate law which it is our purpose to discuss.

§ 2. **Nature of Law.** — Law, as administered in human affairs, is not studied as an abstract science. Its development is historic. It begins in crude customs of a rude race, slowly modified and moulded through the ages to meet changing social conditions. These changes in large measure have brought the law to our ethical standards *in substance*; *in form*, however, some of the ancient rules, the reasons for which have long ceased to exist, are retained to this day. For instance, an illustration may be next given to which frequent reference is made in the body of this work.

¹ The philosophical basis of the law of successions cannot be entered upon here, but the reader is referred for a lucid discussion thereof to the Introduction in Woerner on Administration, § 1 *et seq.*

CHAPTER II.

EFFECT OF THE FEUDAL SYSTEM IN AMERICA.

§ 3. **Feudal Influences.** — The property of the deceased must be distributed according to law. In the nature of things some person must be put in charge, under the direction of a legal tribunal. Such an official, called executor or administrator, has existed since very ancient times. There is in our day no reason why this official should not take charge of realty as well as of personalty. But such is not the common law. While the title to the personalty goes from the deceased directly to the executor or administrator, and the beneficiaries under a will or the distributees in case of intestacy get their title thereto only through that official, yet realty goes directly to the heir or devisee, and the executor or administrator has no concern therewith.

This common-law view was rational under the feudal system. It is assumed that the student has studied the law of Real Property, and no recapitulation of the development of feudal law is here attempted. If we recall the precarious nature of estates at the time of the Conquest, the original absence of any right in the vassal's heir, as shown long after when the heir's right was recognized in the fine he paid the lord for entering, it was logical that the realty constituted no part of a decedent's estate. When in the lapse of time inheritable estates in the modern sense were developed, the common law as to administration had solidified on the old lines too much to permit of a reformation, apart from statute. The historical fact that the English courts through centuries persistently favored the heir as between conflicting claimants must also be taken into account. Hence it is true to-day that, so far as statutes have not changed the law, the executor or administrator does not take the realty of the decedent.

§ 4. **Modified in England by Statutes.** — The great practical injustice flowing from this doctrine of feudal origin was that

the lands of the decedent, even though he had held the title in fee simple, were not liable at common law for his debts. The evil was met in England by a series of statutes, and in every State of the Union statutory provisions are made, though even in modern times it is possible here and there to find a *casus omissus* still governed by the common law. Those statutes, it should be noted, while subjecting realty to special remedies in favor of creditors, do not in form abolish the common-law distinction between the descent of realty and personalty of the decedent.

§ 5. **Incongruity of the Rule in America.** — The incongruity of this common-law doctrine, more conspicuous in a country in which feudalism had never obtained foothold, together with the attempts made in many of the States to abolish or modify the rule as inconsistent with the true theory of property, has produced much confusion and inconsistency in the decisions of the courts of the several States touching the law of real estate of deceased persons. The common law, including the statutes of England enacted before the settlement of the Colonies, is not only the basis upon which the new States built up their own systems, but was enacted as law in almost every State, introducing, save as against affirmative legislative modification, the feudal principles which it embodies. These principles are so interwoven with common-law jurisprudence that to remove them would destroy the whole texture. It seems to be so difficult, indeed, entirely to eliminate from our codes those rules and doctrines which constitute an essential element of the common law, but which grew out of conditions utterly different from our own, that but few legislatures have undertaken the task of building up a purely American system; and what efforts are made by legislatures in this direction are often thwarted by the conservative spirit of lawyers and judges, in construing American statutes from the standpoint of the common law. In some of the States, however, the distinction between personal and real property, as affecting the course of its descent, has been entirely abolished, and in most of them the common-law rule more or less modified. These attempts to adapt the common law to the condition of things in America, in which the legislative and judicial authorities of each State

proceed according to their own views of the policy demanded for the interest of its citizens, either retaining the common law, or modifying it to a greater or less extent, or cutting loose from it entirely, have resulted in a bewildering labyrinth of conflicting decisions, not only among the several States, but in the States themselves.¹

§ 6. **Function of Special Courts for Administration.** — Postponing consideration of the historical origin of our Probate Courts, we direct attention to a fundamental difference between all courts having exclusive jurisdiction of matters pertaining to the administration of the estates of deceased persons and courts of ordinary plenary jurisdiction.

The division of the powers of government into their constituent elements results, in all modern free States, in the three co-ordinate departments, confided to separate magistracies, known as the legislative, judicial, and executive. It is sufficient for the present purpose to bear in mind that it is the office of the judiciary to interpret and apply the law established by the legislative branch to cases arising out of collision, whether actual or imaginary, with the law, leaving it to the executive branch to carry out the judgments of the courts. Thus the judge is seen to act as the organ or mouthpiece of the law, announcing, in each case brought to his official cognizance, whether the alleged collision between the will of an individual, as objectified in an outward act (for will which is undetermined, not become external by accomplishment of its purpose, is beyond the realm of the law, which deals only with the actual), is real or imaginary. In the exercise of this function, the judge, with a directness peculiar to this branch of sovereign power, accomplishes the great office and end of the State and of all government, the accomplishment of justice, the realization of will: securing to the rational will of the individual its legitimate fruition, and holding the irrational, capricious, or negative will to its own logical result (reparation and punishment for wrong and crime).

But we have seen that all property subject to administration is deficient in that element which alone can be the basis of a *collision* between the individual will and the law; it is the

¹ Woerner on Administration, § 16.

province of the court having jurisdiction over the administration of decedents' estates *to supply the individual will* lacking in the property, to fill the vacuum created by the death of the owner with the content of the universal will; that is, to secure the disposition of property under administration as the owner, acting rationally, would have disposed of it if living. The functions involved in this office have a ministerial element superadded to their judicial quality, which, if they occurred in ordinary courts of law or equity, would require the intervention of adjuncts — commissioners, auditors, referees, etc. — involving, aside from the question of inconvenience, delay, and cost, an incongruity in the duties of the office.

Such being the logical basis and scope of courts having control of executors and administrators, their historical development in England, but more particularly in the United States, has been a gradual but steady separation from the common-law and chancery courts, and has resulted in a practical recognition of probate jurisdiction as a distinct and independent branch of the law, destined to achieve for itself a sphere *sui generis*, based upon and determined by its own inherent principles.¹

¹ Woerner on Administration, § 11.

TITLE ONE.

OF THE DEVOLUTION OF PROPERTY ON THE DEATH OF ITS OWNER.

PART I.

OF THE DEVOLUTION AS DETERMINED BY THE ACT OF THE OWNER.

BOOK ONE.

OF TESTAMENTARY DISPOSITION OF PROPERTY.

§ 7. **What is Disposable.** — A man must be just before he is generous. The law must step in to protect rights existing at death, such as those of creditors. But in normal cases, after the demands of justice are satisfied, there is a residuum to be disposed of. The disposition of that balance, the estate which really belonged to the deceased, is the matter we shall first consider.

§ 8. **Disposition by Will or in Case of Intestacy.** — The deceased may dispose of that balance in the way and to the extent the State permits it (last will); or, in default of such disposition by the deceased, the State will determine to whom the estate goes (the law of descent and distribution).

CHAPTER III.

OF THE EXTERNAL LIMITS PLACED UPON TESTAMENTARY
CAPACITY.

§ 9. **The Right to make a Will.**—The right of a person to dispose of his property after his death is not an unlimited natural one. The State not only regulates the form of the exercise of such rights, but in many countries has heavily restricted it. The Roman law proceeded from practically unlimited power of disposition (Law of the Twelve Tables) to a limitation thereof (*Lex Falcidia*). In most countries of the Continent of Europe children have to-day rights to some definite portion of the estate of the deceased parent, of which they can be deprived by will only under peculiar circumstances. In the United States, the Code of Louisiana, which retains many principles of the Civil Law, most nearly represents the Continental view.

The legislation of England has constantly enlarged the powers of testators in this respect until now it has been said that both in England and America the right to dispose of property by will is as broad and comprehensive as the right of disposition while living.

Still, though our jurisprudence does not recognize the continental view that children take from parents by a natural right of succession overriding the will, it does set aside from the decedent's estate some things for the support of the widow and minor children. This may be considered the enforcement of a high duty of the deceased, a duty even higher than the payment of personal debts. This law of dower, widow's rights, support of family, and homestead are deferred to subsequent chapters.

§ 10. **The Right to will Realty at Common Law.**—It must be noted that there was a long period in English history during which the legal title to real estate could not be dis-

posed of by will. In the inception of the feudal system obviously the feoffee left at his death no interest in the land. He thus could make no will, and the principle thus established was maintained as to legal estates until the Statute of Wills (32 Henry VIII — A. D. 1541). But it had been held that uses could be disposed of by will, and that powers to create uses could be exercised by a will. When the feudal system was forced to accommodate itself to more modern demands, this power to dispose of uses by will tempered the rule that legal titles could not be willed. But when the Statute of Uses was passed (27 Henry VIII — A. D. 1536) it was at first supposed that the object of the Statute, namely, the destruction of all equitable estates, had been fully accomplished. With such result it would have been impossible to dispose of realty by will. It is true that land owners could have adapted themselves to the equitable estates evolved under court decisions from the statute. It is now clear that by creation of recognized equitable estates, the owner could practically secure the right of testamentary disposition without depending on the Statute of Wills. But the evolution of these equitable estates under the Statute of Uses took generations. When the Statute of Wills was passed it seemed necessary to secure the power of testamentary disposition of realty.

§ 11. Testamentary Capacity. — All natural persons have capacity to make a will, as they have capacity to contract, unless they fall within excepted classes, which are fixed by law on grounds of public policy; or unless from immanent defect of mind they are not able to do so.

Questions as to disqualifications created by law may arise from reasons of public policy without reference to the mental capacity of the individual, as for instance in the case of aliens. On the other hand the legal disqualification may rest on an arbitrary conclusive presumption as to that capacity, as in the case of minority.

§ 12. Aliens. — This section extends beyond the immediate question whether an alien can make a will, and deals with the rights in property of a deceased alien, testate or intestate, and with the right of an alien to take, by will or descent, property of the deceased, whether alien or not.

An alien can dispose of personalty by will as freely as can a citizen. But the situation is different as to realty.

It is against the policy of the State that its lands should be controlled by aliens. But it is for the State alone to enforce that policy or forbear doing so. Third persons cannot invoke this right, which rests in the exclusive discretion of the State. Hence the alien who acquires realty by "purchase" can hold it against any one but the State. The State can assert its right against the living alien only by a judicial procedure, by information and "office found." The public policy is directed against the control of realty by aliens. Should the living alien part with his title before the State sees fit to enforce the forfeiture, there seems to be no reason why the alien's grantee, otherwise qualified to take, should not hold a title with which the State cannot interfere. The alien can even sue in ejectment.

An alien cannot at common law be heir to realty. Upon the death of an intestate owner of realty, whether citizen or alien, leaving only aliens as his surviving relatives, the property escheats to the State. In this case there is no occasion for the exercise of the State's discretion. The relatives, no matter how close, are not heirs: the State takes directly as "*ultimus hæres*."

It would seem clear that an alien can *take* under a will. No reason is perceived why a devise should be excepted from the rule that an alien can take by "purchase" (as the latter term is technically used in the law of real property). Of course such alien devisee takes subject to the exercise of the State's right to divest his title.

It would seem that the alien owner's will should dispose of his realty, not only against non-alien heirs, but also against the State.

The foregoing states the common law. Discussion of some doubtful points is omitted because changes by statute in the American States in the nineteenth century went far toward obliterating the distinction between citizens and aliens in the ownership of real property. Many, if not most, States enabled alien friends to acquire lands by purchase, devise, or descent, and to hold, alien, devise, and transmit the same uncondi-

tionally. In later years, however, large holdings of land by foreigners, natural persons, and corporations have caused alarm, particularly in the Western States, and a counter current has set in, indicating a disposition on the part of legislators to restrict the concessions theretofore made to aliens. The laws of each State must be examined, and of course the common law must be remembered in that connection.

Though the title of aliens to land within the limits of the several States of the Union is a matter of State regulation, yet the treaty-making power of the United States includes the regulation of the transfer, devise, and inheritance of property in this country owned by citizens of a foreign country: hence a treaty between the United States and a foreign country will control or suspend the Statutes of the individual States when there is a difference between them.¹

§ 13. **Infants.**—It is clearly impracticable to inquire in each individual case whether a young person has sufficient capacity for a contemplated act. The law fixes the age arbitrarily. For different purposes different ages may be fixed; *e. g.*, for capacity to contract, to marry, to vote, to commit a crime. In England a male of fourteen and a female of twelve could make wills of personalty. This limitation seems to have been derived from the canon law, which was natural, since ecclesiastical courts had jurisdiction in probate matters, as will hereafter appear. But the rule was abolished by statute in England in 1838. There, now, no will of realty or personalty can be made by a person under twenty-one years of age. The matter in this country is regulated by statutes, which must be examined in each case. In some States wills of personalty are permitted at an earlier age than wills of realty; in others females can make wills of realty or personalty at an earlier age than males. The more common provision is to require the testator to be of full age to make a will of realty or personalty.

The appointment of testamentary guardians, as authorized by the Statute of 12 Car. II., is in many States expressly conferred on infant fathers.

¹ Wunderle *v.* Wunderle, 144 Ill. 40, 54; Blythe *v.* Hinckley, 127 Cal. 431.

§ 14. **Married Women.** — At common law a married woman could make no will. This results from the common-law doctrine merging the wife's legal existence in the husband. As wife she can have no *will*, to contract, or to dispose of her property after death. So-called exceptions are cases which really fall outside of the reason of the rule.

Thus it is said that a married woman may will personalty with the consent of her husband. Since the husband can make the wife's personalty at common law absolutely his own, the transaction is really the husband's gift. Accordingly it is held that the husband may retract his consent even after the wife's death provided it is done prior to the probate of the will.

So a married woman may dispose by will, without her husband's consent, of property which she holds in some trust capacity, as where she takes as executrix. Here she has no interest in the property and consequently her husband has none. Should she have a beneficial interest, her will could not dispose of that without her husband's consent.

While the rule at law is as above stated, in equity the power of married women to dispose by will of their equitable interests in real as well as personal property has been fully recognized for centuries, antedating the Statute of Wills and the Statutes of Uses. Hence all property over which courts of Chancery have jurisdiction may be as freely and fully devised by a married woman as by a feme sole, whether the legal estate is vested in a trustee or not, since the husband and all persons on whom the legal title may devolve will be deemed trustees for the persons to whom the wife's will gives the equitable interest.

The common-law disability of a married woman to make a will has been substantially obliterated in most jurisdictions. In England it was done by the Married Woman's Property Act of 1882 (45 and 46 Victoria). In most States of the Union a married woman can make a will as freely as a feme sole; but in some (*e. g.*, Georgia and North Carolina) the common law prevails; while limitations of different kinds exist in a number of States.

CHAPTER IV.

INCAPACITY ARISING FROM MENTAL DISABILITIES.

§ 15. Degree of Mental Vigor Requisite to make a Will. —

The incapacity to make a will may be based on personal mental deficiency, arising from idiocy, lunacy, or other permanent or temporary disorder of the mind, inconsistent with the exercise of the intelligent will, the question here being as to the testator's subjective mental condition without reference to influences from outside; or the incapacity may be based on such mere weakness of the mind as unfits it to resist undue influences, so that the testator's dispositions cannot be said to be his own spontaneous acts, but rather the results of importunities, devices, fraudulent representations, or even of threats and force brought to bear on him by designing persons.

Taking up first the testator's subjective mental condition, no rule can be laid down to indicate the precise degree of intelligence or mental vigor necessary to constitute testamentary capacity. Clearly the capacity which is adequate for the transaction of the ordinary business of life suffices for making a will. A party capable of acting rationally in buying and selling property, settling accounts, collecting and paying out money, and borrowing or loaning it out, is capable of making a valid will. But while this is true, it does not furnish the proper test: since an inferior degree of mental power may suffice for making a good will. The rule laid down in a number of States seems now to be this: "While the law does not undertake to measure a person's intellect, and define the exact quantity of mind and memory which a testator shall possess to authorize him to make a valid will, yet it does require him to possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he

shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and executed; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity; and even if this amount of mental capacity is somewhat obscured or clouded, still the will may be sustained."¹ It should be remembered that the decisive question always is whether the instrument propounded is the spontaneous act of a person understanding its nature and consequences. As is explained hereafter, the question whether the instrument is the last will of the testator is usually contested before a jury, and is a question of fact for the jury under instructions of the court.

§ 16. **Incapacity of Idiots, Imbeciles, Deaf, Dumb, and Blind.** — The incapacity to make a will may be merely temporary at the time of making the will (*e. g.*, the delirium of a fever), or a derangement of mind as to facts (*e. g.*, lunacy as discussed in the next section), or a permanent incapacity of a general nature (*e. g.*, imbecility or idiocy). Imbecility in its strict use should be limited to the mental condition in which no will can be made. This still is the sense when we speak of imbeciles. But imbecility is also used at times to describe a condition of mental weakness falling short of incapacity to will, but subjecting the individual to influences which ordinary minds would resist. In this sense imbecility is an important factor when a will is attacked as having been obtained by undue influence. The two uses of the term must be carefully distinguished.

There is in old cases much discussion as to idiocy and various special phases thereof. Early writers lay down such narrow tests as inability to count twenty pence, to tell father and mother, or his own age. But, in view of the test laid down in the preceding paragraph, such discussions seem profitless. Of course a natural fool has not sufficient mind to make a will, but mere weakness of mind, whimsicality, or eccentricity is not sufficient in the absence of other proof of incapacity to invalidate a will. Nor is the situation different when the weakness of mind is brought on by old age, epilepsy, or similar diseases, habitual drunkenness, or any other cause. Senile dementia may be so pronounced as to invalidate a will, but it must be remembered

¹ *Bundy v. McKnight*, 48 Ind. 502, 511; *Harvey v. Sullens*, 46 Mo. 147.

that less mind is needed for a will than for a contract. "There is no rule of law which prescribes average capacity for a testamentary act."¹

In English law and in the civil law, from which the rule was borrowed, it was held that a person born deaf, dumb, and blind was incapable of making a will. Such is not the law now. Such a person, or one merely blind, or merely deaf and dumb, can make a will if capacity otherwise exists. But as imposition can easily be practised on one in such unfortunate position, modern authorities still require very great scrutiny in such cases into the testator's knowledge and approval of the will. So, while it is not ordinarily necessary to prove that the will was read by or to a testator with the normal senses, since a person signing an instrument is presumed to know its contents, yet if evidence be given that the testator was blind, or could not read, or for any reason was not acquainted with the contents of the will, such evidence must be met by satisfactory proof, either that the will was read to or by the testator, or that its contents were known to him.

§ 17. **Lunatics.**—The distinctions between idiots, persons of weak mind, and lunatics may be of practical importance in will contests. For if it be proved that the testator was an idiot, this will invalidate the will. If it be shown that he was of weak mind, the question will usually be whether there was undue influence. If his mind was affected by delusions (lunacy), the validity of the will must depend upon the further question whether it is affected by, or its provisions are the consequence of, an insane delusion.

Lunacy was first applied with reference to those who suffered periodical mental aberration, supposed to be dependent on lunar influence; whence the term is derived. It was then used to include those who suffered permanently from partial mental derangement. As now used, it denotes insanity generally. It is said to be a disease of the brain, a mental disorder by which the freedom of the will is impaired. The legal test of insanity is delusion. "Insane delusion consists in a belief of facts which no rational person would believe,"² taking things for realities

¹ Per Cooley, J., in *Hoban v. Piquette*, 53 Mich. 346, 361.

² *Forman's Will*, 54 Barb. 274, 289.

which exist only in the imagination, and which are impossible in the nature of things, mingling ideas of imagination with those of sensation, and mistaking one for the other.

Partial insanity, existing when a person has insane delusions as to one or more subjects only, does not destroy testamentary capacity unless the insane delusion affects the testamentary disposition. But, if that be the case, the will is bad, though the testator have sound memory and good reasoning powers in all other matters.

Neither superstition nor ignorance, however gross, nor error in fact, nor prejudice, nor unfounded suspicion, amounts to an insane delusion. Nor does moral insanity, unaccompanied by insane delusion, vitiate a will, however unjust, unnatural, or perverse the content, or immoral the motive may be. But such facts may be shown together with other evidence as bearing on the question of unsoundness of mind.

§ 18. **Presumption of Sanity.** — The burden of proving the validity of a will rests necessarily upon him who propounds it for probate. It is obvious that he must show, among other things, the sanity of the testator, without which his proof must fail, and the instrument propounded cannot receive probate. But since experience has shown that sanity or soundness is the general condition of the human mind, the law permits the proponent of the instrument to rely on the presumption of sanity arising out of this experience, instead of requiring affirmative or actual proof thereof. If, therefore, a will is produced and its due execution proved, this, in the absence of further proof, is sufficient to establish the will. This is the English rule, and is the prevailing doctrine in America, although the applicability of this presumption of sanity, and its extent in support of a last will, has given rise to voluminous discussions in the text books and in the courts. Contrary to the general doctrine just stated, affirmative evidence of the testator's sanity is necessary in a number of States; but even in some of these States the presumption of sanity, although it may not be sufficient when entirely unsupported by affirmative testimony, may be relied on in aid of such affirmative testimony, and will have its effect where the testimony is doubtful or contradictory.

The presumption just stated applies specifically to will

contests. When wills are formally proven without opposition in an *ex parte* proceeding, the statutes and method of procedure in the different States may vary the rule.

§ 19. Presumption of Continuance of Proved Insanity — Lucid Intervals. — The will of an insane person may be valid if it be shown that it was executed during a lucid interval. When such evidence has been produced as will satisfy the jury of the testator's insanity before the execution of the will, it is indispensable to the validity of the will that it be shown to have been executed during a lucid interval, or upon cessation, whether temporary or permanent, of the malady. Under the general rule that a state of affairs once shown to exist is supposed to continue, proof of the testator's insanity before (and indeed recently after) the execution of the contested will, throws the *onus* of proving sanity at the time of the execution of the will upon the proponent. But this presumption does not exist where the malady under which the testator labored was in its nature either accidental or temporary; nor is it raised by the suicide of the testator soon after making his will.

If the proof of insanity consists in the decree or judgment of a competent court declaring the testator to be *non compos mentis* and placing him under guardianship, the presumption is, and continues to be until there be a decree or judgment by a competent court declaring his restoration, that he is incompetent to make a valid will. But this may be rebutted by competent testimony of capacity.

§ 20. Opinions of Non-experts as to Sanity. — The "opinion" rule requires the witness (except the expert) to limit his testimony to concrete facts, and to refrain from the statement of conclusions. The rule and its exceptions are the source of much discussion in the law of evidence. For the subject here in hand, the question is whether in a contested will case a witness (not being an expert on insanity) shall be permitted to give his opinion as to whether the testator was sane or insane, based on his acquaintance with him. The opinion is generally permitted to be given,¹ although the authorities are by no means unanimous on this subject. The reason as stated in the dissenting opinion of Doe, J., in *Boardman v. Woodman*, 47 N. H. 120,

¹ *Turner v. Am. L. & T. Co.*, 213 U. S. 257, 260.

144, is that such witness' opinions "are competent, because, considered in connection with the means of observation on which they are based, they are the best evidence of which the case in its nature is susceptible. From the nature of the subject, it cannot generally be so described by witnesses as to enable others to form an accurate judgment in regard to it." But where the opinion is admitted, it is generally required that in connection therewith the witness shall first state the facts (known to him) upon which that opinion is based.

But the witnesses who subscribe the testator's will at his request to give it validity, occupy a peculiar position in that it may be said that the testator has invoked their testimony to the validity of his will. Such subscribing witnesses are not generally required to state the facts upon which they base their opinion; but their testimony is of course not conclusive, though entitled to great regard; but the importance to be attributed to the mere opinion of a non-expert witness who has not subscribed the will is a different matter.

§ 21. Incapacity in Consequence of Force, Fraud, or Intimidation. — A will coerced by actual force employed upon the testator, or by threats and intimidations, or obtained in consequence of fraud perpetrated upon him, is self-evidently void, because it is not his spontaneous act or free will. For the same reason the law does not recognize that as a valid testamentary act which is the result of external influence brought to bear upon the testator to an extent and under circumstances which overpower his free will. Out of this principle springs a prolific source of litigation between heirs at law and beneficiaries of testators; and no subject affords greater scope to juries for the indulgence of personal opinions and views of right and wrong.

§ 22. Incapacity arising from Undue Influence. — Undue influence, to vitiate a will, must be such as caused the testator to dispose of his property contrary to his judgment or desire in consequence of fraudulent representations or importunities and external pressure which he was too weak to resist, and hence always contains an element of coercion or fraud destroying free agency; if his judgment was not misled by false representations, nor his will overpowered by irresistible importunities, no influence brought to bear upon him can invalidate his will, because

it is in such case free from the element of coercion or fraud. No precise line can be drawn distinguishing legitimate from unlawful influence, except the general one thus indicated; but it is held that considerations addressed to a testator's good feelings, simply influencing his better judgment; the earnest solicitations of a wife, or the exercise of influence springing from family relations, or from motives of duty, affection, or gratitude; persuasion, argument, or flattery; kindness and attentions to the testator; and influence worthily exerted for the benefit of others, cannot be considered as "undue," so as to affect the validity of a will inspired thereby. The mere opportunity to exercise influence over a testator does not, even in connection with an unjust will, warrant the presumption of undue influence, in the absence of affirmative evidence of its exercise, where the testator's mind is unimpaired, and he understood the contents of his will.

What degree of influence will vitiate a will depends much upon the bodily and mental vigor of the testator, for that which would overwhelm a mind weakened by sickness, dissipation, or age might prove no influence at all to one of strong mind in the vigor of life. The question to be decided is, whether the testator had intelligence enough to detect the fraud, and strength of will enough to resist the influence brought to bear upon him.

Influence is never presumed (except in the case to be considered below, between attorney and client, or where the legatee sustained a fiduciary relation to the testator), but must always be proved by the party alleging it; not generally, but as a present constraint operating at the time of executing the will, hence the ratification of a will drawn under undue influence, when the influence has been removed, cancels the objection to the validity of the will on that ground. The proof must exclude the hypothesis of the testator's acting upon his own free will, which, like other facts, may be proved circumstantially. The contents of the will, or even of a prior revoked will, may be considered in connection with the testator's disposition and affections, and declarations about it, as indicating whether there was extraneous influence; remembering, however, that the unnatural character of the will does not of itself prove undue

influence. But gross inequality of distribution may be considered as a circumstance, though not of itself sufficient, to prove undue influence; and the unnatural character of the will, when supplemented by other suspicious circumstances, may throw the *onus* upon the favored beneficiary.

§ 23. **Presumption against Legacies to Fiduciary Advisers.** — The rule that undue influence may never be presumed, but must be proved by the person who alleges it, is subject to an exception in those cases in which a legacy is given by a testator to his attorney, confidential adviser, guardian, or other person sustaining toward him any fiduciary relation. Proof of the existence of such relation raises the presumption of undue influence, which is fatal to the bequest unless rebutted by proof of full deliberation and spontaneity on the part of the testator, and good faith on the part of the legatee. In some States the principle above announced, so far as it applies to wills, is modified to the extent that the *mere* fact that a gift is made to one standing in a fiduciary relation (no matter how close), while being a suspicious circumstance calling for jealous scrutiny, is of itself insufficient to presumptively invalidate such gift; there must be coupled therewith some act of the beneficiary, however slight (depending on the circumstances) in some way connecting him with the will.

§ 24. **Presumption as to Seamen's Wills.** — A similar exception to the ordinary rules and presumptions by which the intention of testators is to be ascertained is made in the case of seamen, whose temporary necessities are considered to operate upon them as a sort of duress on the part of those who are to furnish the supply.

§ 25. **Partial Avoidance of Will by Undue Influence.** — If undue influence or fraud, though exercised by one legatee only, affect the whole will, the whole will is void; but both justice and policy require that the rejection of a legacy obtained by fraud or undue influence should not invalidate other provisions in the same will in favor of legatees who have not resorted to improper means. For the like reason, an erasure or alteration in the will, though found to have been made after execution, does not avoid the will *in toto*; if made by a stranger, and the original legacy be known, it will have no legal effect, the legacy

will be still recoverable, and ought to be proved as it originally stood; but if made by the legatee himself, it will avoid the legacy so altered, but cannot destroy other bequests in the will, either to such legatee or others. This doctrine will be further considered in connection with the probate of wills.

CHAPTER V.

FORM, EXECUTION, AND ATTESTATION OF WILLS.

§ 26. **The Will is Ambulatory.** — The office of a will — more accurately called last will or testament — is to control the disposition, in the manner desired by the testator, of his property after his death. In its essential nature a will is ambulatory, for it is not operative before the testator's death, until which time it can vest no rights in others, and may therefore be revoked or changed at the testator's pleasure.

§ 27. **Wills distinguished from Conveyance of Future Interests.** — It is not merely possible, but not uncommon, for the living to convey present interests in their property to take effect only after their death, which conveyances are not wills. The conveyance by A of his realty to a trustee to hold for A for life with remainder to B in fee furnishes an illustration. At A's death the same result is practically accomplished as if A had made B his devisee. But a vital practical distinction as to the value of such documents lies in this: Had A made a will, it would have been ambulatory: a mere nothing till A's death called it into legal existence; and consequently A could have made any other disposition of the property he saw fit after the execution of such a will. But had A made a valid conveyance, vesting at the time an interest in B after A's death, though of course the enjoyment would be postponed, B's rights thus acquired could not be divested by any act of A's, testamentary or otherwise.

Difficulties may arise in determining whether the document in question was meant as a testamentary disposition merely, creating no present interest, or whether, at the time of the execution of the instrument, it was meant to create an interest the enjoyment of which was to be postponed till the death of the party executing the instrument.

The question most frequently arising when the instrument

on its face is held to be capable of interpretation as a present conveyance is, whether it has been delivered. A deed, however solemn in form, is nugatory if not delivered, and can only stand as a will, provided of course that it complies with the requisites for such an instrument. The matter frequently takes a practical aspect, when an instrument which for some technical reason cannot stand as a will, has been given to a third person with directions more or less positive or qualified for delivery after the maker's death. It can then be good only as a present conveyance. What constitutes delivery of a deed pertains to the law of real estate, and cannot be discussed here further than by calling attention to the practical test of asking whether the maker has lost control of the instrument. Had he the right, under the circumstances of the case, to get the instrument back, in his life-time, from its custodian? If so, it may be a will, but is not a deed.

The practical importance of the distinction between a conveyance and a will becomes prominent when it is remembered that the formal requirements as to these instruments vary. A document may be good as a deed which is bad as a will, and *vice versa*. Thus a deed in most States still requires a seal: a will does not; a will must have subscribing witnesses; in these days a deed generally need not.

§ 28. **Conditional Wills.**—A will is usually absolute in that it is intended to become operative at the testator's death; but it may be made conditional upon the happening of some other event, and is then void unless such event happen. In wills containing reference to some other event additional to death, it is important to ascertain whether it is the intention of the testator to make the validity of the will dependent upon the condition, or merely to state the circumstances inducing him to make the testamentary provision. In such interpretation courts, while recognizing the danger of going beyond the literal and grammatical meaning of words, invoke the principle that the primary import of the words is modified and controlled by the dominant testamentary intention to be gathered from the instrument as a whole. This is illustrated in the case of *Eaton v. Brown*, 193 U. S. 411. The will in question in that case began: "I am going on a journey, and may not ever return.

And if I do not, this is my last request." As the writer returned safely from the journey, dying afterwards, the will would seem bad on literal interpretation. But the will disposed of all the property by two gifts which indicated an abiding and unconditioned intent — one, to a church; the other, to a person whom she called her adopted son. The will concluded: "All I have is my own hard earnings; and I propose to leave it to whom I please." This self-justification was viewed by the court as explanatory of an unqualified disposition, having no connection with the return from a journey. The court accordingly construed the initial clause as stating the inducement for the act, and not a condition; and upheld the will.¹

The question may also arise, when the language clearly imports a condition, whether it applies to the whole will, or affects only some part of it.

§ 29. **Joint and Mutual Wills.** — The term *mutual* will is used to describe the instrument in which two join, each disposing of his property absolutely to the other. On the first death the whole property belongs to the survivor to dispose of as he sees fit. The *joint* will disposes of the property of two persons in such a way that third persons are also beneficiaries. The survivor of the joint makers takes the property subject to the future dispositions of the joint will.

From the ambulatory nature of a will it is clear that any restraint which a single testator imposes on himself by the terms of his own will against any other disposition of his property than is therein set forth is nugatory. A subsequent contradictory will must control.

From this inherent revocability of wills it has been urged, as appears in a few decisions and various *dicta*, that joint wills at least conflict with this rule, and are unknown to the common law. The weight of authority, however, recognizes joint wills and mutual wills as valid. Where both parties thereto act in accordance with the instrument, it is believed no court would refuse to-day to recognize the ultimate titles thereunder.

§ 30. **Joint Wills as Contracts.** — But the contractual element in such a joint will requires further consideration. In a joint will the disposition of his property made by one maker

¹ For another illustration see *French v. French*, 14 W. Va. 458.

thereof furnishes a consideration for the disposition made of his property by the other. A and B join in a will, each conveying his property to the other for life with remainder in both estates to C in fee. A dying first, can the survivor, B, make a will in favor of D, ignoring C? To so hold would be shocking to the moral sense. In legal view A and B made the will on reciprocal considerations. When the contract is wholly performed on one side, which is accomplished when the survivor takes the property under the will of the pre-deceased, the whole is held by the survivor in trust. The ultimate beneficiary of the joint will is the *cestui que trust*, and as such can compel in equity the carrying out of the provisions of the joint will.

It is not necessary to say that the will of the survivor in contravention of the joint will is a nullity. There seems to be no reason why the will of the survivor should not be good as to all parties save the beneficiaries of the joint will, just as the conveyance of any other trustee of an equitable trust with legal title is good enough, save as against the *cestui que trust*. Though the survivor's new will may be probated *as such*, the ultimate beneficiary under the joint will may enforce his right in equity like any other *cestui que trust*. It is true the *cestui que trust* in other cases may be hampered by the necessity of showing that the purchaser from the trustee took with notice. But this requirement has no application in the case of a will by the survivor in contravention of the terms of a prior joint will to which he was a party. For the beneficiary under the will of the survivor is not a "purchaser"; he stands in the shoes of his testator, and is held without notice of the trust. This view fully recognizes the ambulatory nature of the will, as will, without militating against the practical remedy of the beneficiary of the joint will.

§ 31. **Separate Wills in Pursuance of Contract.** — If the will of two persons rests on reciprocal considerations, it can make no difference in principle whether the wills are put in one joint document, or whether each of the parties makes a separate will in accordance with the agreement. A practical distinction, however, is important. If the will is joint, it may carry on its face convincing evidence that it rests on reciprocal legal considerations. But in the case of identity in the terms of separate

wills, though made at the same time, upon consultation, it may well be that the parties have simply arrived at a common conclusion, without any element of reciprocal consideration. The consideration in such case must be affirmatively shown. In absence thereof, either of the wills is revocable at any time, in any way the maker wishes.¹

§ 32. Contracts to make Particular Provision by Will. — The proposition underlying the foregoing paragraphs, stated in its broadest terms, is, that a person can make a contract or agreement, enforceable in equity, for disposition of his property after death which will override any contravening will. The doctrine is recognized in this broad form and finds frequent application in cases where services were rendered to the testator in his lifetime or where infants have been taken from parents or others in charge of them in reliance upon a promise by the person to whom the services were rendered or to whom the child is thus given, to make suitable compensation or provision by will. It often happens that after the person has rendered such services or the child has discharged all the duties of the assumed filial relation till the testator's death, he is left without provision. Numerous authorities uphold the right of the promisee or child to recover from the promisor's estate according to the promise, whether the promisor died intestate, or made a will conflicting with the promise. But courts wisely decline to grant relief in such cases unless the contract be established in definite terms by clear and convincing proof.²

§ 33. No Formality as to Will's Contents. — Passing for future consideration the limited possibilities of oral wills, there are legal requirements for written wills as to signature and attestation which must be strictly complied with, as discussed in subsequent sections. Apart from these prescriptions a written will is not bound to any set method of expression. The instrument stands as a will, if it has in any language the essentials of a will: an expression of a present intention to make disposition of property at death, revocable at pleasure.

If then the instrument is really a will, as above explained, it may be drawn in the form of a deed poll, an indenture, a deed

¹ *Edson v. Parsons*, 155 N. Y. 555.

² See note to *Pfluger v. Pultz*, 43 N. J. Eq. 440.

of gift, a warranty deed, a marriage settlement, letters, drafts on bankers, assignment of a bill, endorsement on bills, notes, or stocks, promissory notes, notes payable by executors or administrators to evade the legacy duty, or power of attorney. It may be in part a deed or other contract and in part a will; or it may be supposed to operate as a deed, bond, or other instrument of gift, and yet, though inoperative as such, be valid as a testamentary disposition — always provided it contains the essentials of a will.¹

§ 34. **Nor as to Writing Material or Language.** — A will may be written or printed, or partly written and partly printed, engraved, or lithographed. Blank spaces left in the will do not necessarily invalidate it; but it is better to avoid them, because they facilitate fraudulent interlineations. The writing may be in ink or in pencil; but when a question arises whether the testator intended the paper as testamentary, or merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance, and the general presumption and probability is held to be, that, where alterations are made in pencil, they are deliberative; where in ink, they are final and absolute.

So too the will is valid whether written in the language used in the forum, or in a foreign tongue. A will duly executed with knowledge of its contents is valid though never read by the testator, or written in a language unknown to him.

§ 35. **The Signature.** — Without the testator's signature the written instrument, so far as it is offered as a will, is a nullity. This rests on the English Statute of Frauds, under which all devises of lands and tenements were required to be in writing and signed by the party devising the same, or by some person in his presence and by his express direction. This provision is incorporated into the statutes of nearly all the States. The stringency of the requirement is illustrated by the case of two persons, intending to make wills in favor of each other, and precisely alike, *mutatis mutandis*, each by mistake signing the other's intended will. There is in such case no valid execution of either document.

The making of a mark by the testator was held sufficient as

¹ For illustrations and cases see Woerner on Administration, § 38.

a signature under the Statute of Frauds, without reference to the question whether he could write at the time. It is held equally sufficient under the later English Wills Act, and in the several States. The mark of the testator has been held a proper signature, although the name was improperly written by the scrivener; a stamp which had been used by the testator in place of his signature to letters and other documents was held a sufficient execution by mark.

Under the English Statute of Frauds it was held that where every part of the will is written by the testator himself, the name appearing in the body, or as the usual exordium — "I, A B, do make," etc. — is a sufficient signing if the testator so intended. Signing does not necessarily imply subscription of the name. This is the rule in the United States wherever the statute follows the English form; but it must be noted that in many States the statute requires the signature to be "at the end" of the will.

Where the will is written on separate pieces or sheets of paper, not physically connected, it is sufficient for the probate thereof that it be signed on one of them, if it appear by the contents, or by other proof, that the testator included all of them as constituting the will when he signed.

But words of reference will not suffice to incorporate into it the contents of an extraneous paper, unless it can be clearly shown that, at the time the will was executed, such paper was actually in existence.

The principle that the signature of the maker of any instrument affixed to it by another in the maker's presence and by his express direction is valid, applies to wills. It is held that the testator's hand may be guided to make the mark, or write his name, and that this constitutes a valid signature by the testator; and the acknowledgment of the execution of the instrument as a will is a sufficient direction, although signed by another. But if the testator directs another person to sign for him, and intends to affix his mark in completion of the signature, the will is not properly signed unless the mark is made.

The rule is of course subject to statutory control. Thus in New York and New Jersey the testator must sign in person; and in some States the person signing the testator's name is re-

quired to sign his own as witness with the statement that he wrote the testator's name at his request. In such cases an omission to comply with statutory requirements is fatal to the will.

§ 36. **Attestation.** — The English Statute of Frauds required the attestation of wills by "three or four credible witnesses" by subscribing the same in the presence of the testator. A similar provision is incorporated into the statutes of all the States, varying, however, as to the number of witnesses required, and as to the further requirement that "the witnesses shall subscribe in the presence of each other."

When it is necessary to ascertain the law in any concrete case, on this point, as indeed on any other, the statute of the State in question must be consulted. The prevailing theory, with mention of some marked variations therefrom, is all that can be attempted in this treatise.

The statutes of most States now require not more than two witnesses.

With the exception of Arkansas, New York, and Pennsylvania, the requirement that the witnesses shall subscribe in the presence of the testator seems to be law in all the States. To constitute "presence" in the sense of the English Statute of Frauds and of the American statutes on the subject of wills, it is essential that the testator should be mentally capable of recognizing the act which is being performed before him; for if this power be wanting, his corporeal presence will not suffice. It is not essential that the testator should actually see the witness attest the will; but he must be in such a situation that he might see, and it will then be presumed that he did see. The design of the statute is said to be to prevent the substitution of a surreptitious will.

In some States (*e. g.*, Louisiana, Vermont, South Carolina, and New Jersey) the witnesses are required to sign in presence of each other. This is not required by the English Statute, nor by the laws of the other States.

In the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. But it is held that it is essential to the due execution of the will that the signature of the testator

should precede, in point of time, the signature of the attesting witnesses. Some cases have applied this ruling when the signing and attestation are on the same occasion and part of the same transaction. But the better rule would seem to be to view such signatures as contemporaneous in legal contemplation, and sufficient.

In the absence of statutory direction (such as the requirement of some States that the witnesses, as well as the testator, sign at the end of the instrument) it is not material in what part of a will the subscribing witnesses sign their names, if it is done after the subscription and acknowledgment by the testator, and with the purpose of attesting it as subscribing witnesses.

By the English Wills Act and under American statutes generally, it is required that the testator shall sign or acknowledge his signature in presence of the attesting witnesses; and in most States they must also know at the time that he signed the instrument as and for his last will. Where this is the law no set affirmative declaration by the testator is absolutely necessary; any indication by him to the witnesses of his knowledge that the instrument to be attested by them is his last will, is sufficient. In England and a number of States, however, the witnesses need not know the character of the paper attested by them; the theory being that the attestation is to the signature, not to the document proposed as a will.

The witnesses, like the testator, may subscribe by mark, or by their initials if intended for their mark; or, if they cannot write, the hand may be guided by another person. An attestation clause, reciting over the witness' signature all essential facts to constitute valid attestation is nowhere required by the law; though its value at the proof of the will, in refreshing the memory of the witness, or even committing him to its statements, is obvious.

§ 37. Change in Law as to Testamentary Formalities. — It may be stated, in this connection, that where there is a change in the law governing the execution of a will, made in the interim between its execution and the testator's death, the question arises as to which law governs. It is held in some States that the law in force when the will is executed must be complied with; but the stronger reasoning and weight of authority leads

to the conclusion that the will should be executed in conformity to the law in force at the testator's death.

§ 38. **Competency of Attesting Witnesses.**—The statutes mostly require the witnesses to be "credible" or "competent"; by which is meant that they must be competent persons to testify in a court of justice, not being disqualified by mental imbecility, interest, crime, or marital relation. That the competency of the witnesses as *attesting* witnesses must refer to the time of attestation seems clear enough on principle; else the validity of the will would be made dependent on circumstances beyond the control of the testator, and enable the attesting witnesses, by rendering themselves incompetent, to defeat it. It is so enacted in most of the States; and where not enacted by statute, it is nevertheless generally so held by the courts.

The interest which renders an attesting witness incompetent is that which at common law would disqualify him from testifying in a suit depending on the establishment of the will. A gift to husband or wife of a subscribing witness would disqualify, while a gift to the witness as trustee without any interest as *cestui que trust* would not.

Statutes in all States have put an end to the disqualification through interest, so far as evidence in court is concerned, but these statutes do not apply to the qualification of witnesses to a will.

It was finally held by the courts that a witness rendered incompetent by reason of his interest under the will could be restored to competency by destroying his interest by means of a release before testifying; but an assignment of his interest was not enough. This procedure is sanctioned by statute in several States. As the witness could not be compelled to release, parties interested under the will were still at the mercy of the witness. A more efficient remedy was provided by the 25 George II, followed in most of the States, which destroys any interest which a subscribing witness would acquire under the will. Hence interest in the probate of the will, under such statutes, does not disqualify an attesting witness; but the fact of attesting disqualifies the witness from being a beneficiary legatee or devisee. He now can be compelled to testify.

It is also provided by the statutes of most of the States that where an attesting witness, to whom a gift is made in the will, would have taken a share of the estate in the event of intestacy, he is not only a competent witness, but may also take under the will so much as would have come to him in case of intestacy, not exceeding however the gift in the will. Some courts have reached this decision independent of statute.

In a great number of States it is enacted that where a will contains a devise or legacy to an attesting witness, but is attested by a sufficient number of competent witnesses in addition to such devisee or legatee, it may be proved without his testimony; and held good, including the gift to the attesting witness.

Whether the appointment by the will of one who is subscribing witness as executor works disqualification of the witness has been variously decided. The executor at common law could obtain advantages from his position, beyond compensation for his services (which indeed was denied). In several States it has accordingly been held that the person named as executor is disqualified as attesting witness to the will. But in the great majority of States he is a competent witness — either on the ground that the commissions to which he is entitled constitute no “beneficial legacy,” but are given as compensation for services rendered; or, because such witness is rendered incompetent (by the statute avoiding such beneficial legacies) to assume the office of executor.

§ 39. **Holographic Wills.** — Holographic (or olographic) wills are such as are wholly written by the testator in person. In most States they do not differ in any particular from wills manually written by one not the testator. But in several States such holographic wills, following the civil law, are specifically recognized by statute, and distinguished from other wills in that they require less, or no formality, of attestation. But, though the statute of a State may refer to and recognize holographic wills, yet, unless it dispenses with the necessity of witnesses, it must be proved by witnesses. Only by strict compliance with every statutory requisite can a will be established as holographic. Thus where the statute requires the date to be in the document the omission of a figure from the

year has been held to invalidate the holographic character of the instrument.¹

§ 40. Nuncupative Wills. — While, as has been before stated, the power to dispose of legal estates in realty did not exist from the Conquest to the Statute of Wills (32 Henry VIII), personalty could be disposed of by will at all times. Not only this, but the testamentary disposition of personalty required no writing until the Statute of Frauds. These testamentary declarations in presence of a witness or witnesses are known as nuncupative wills. Such oral testaments of personalty were confined within very narrow limits by the Statute of Frauds, "for the prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury." The subject is everywhere regulated by statutes which vary greatly. Only some leading lines of such legislation can here be mentioned.

The English Statute of Frauds affected such nuncupative wills only as disposed of property exceeding £50 in value; where the property bequeathed amounted to less, the common law still governed. In England 1 Vict. c. 26 does away with nuncupative wills altogether, except as to soldiers and mariners in actual service.

Following the Statute of Frauds, a number of States leave wills of personalty up to a certain point as at common law, and apply their restrictions to wills disposing of larger amounts. The amount that can be disposed of varies from \$30 in Texas to \$300 in Maryland.

Another class of States permits nuncupative wills only for property not exceeding a certain value, varying from \$1000 in California to \$100 in Indiana. In these States the statutory requirements must be complied with, and the common-law will is abolished, save, generally, for soldiers and sailors.

Another class of statutes sets no financial limit on nuncupative wills which comply with the respective statutes, thus also abolishing the unwritten common-law will.

In other States all nuncupative wills are abolished, save as to soldiers and sailors.

§ 41. Formal Requisites for Nuncupative Wills. — It will thus

¹ Noyes Estate, 40 Mont. 190.

be seen that the old nuncupative will has been substantially abolished, existing only in a few States for inconsiderable amounts, and applying in all States to soldiers and sailors, as will presently be mentioned. With these few exceptions oral wills of personalty can only be made in strict compliance with the statutes of the respective States, which, with great variation in detail, are based in the main on the provisions of the English Statute of Frauds. Under this statute it is necessary that the words spoken by the testator be proved on oath by competent witnesses "who were present at the making thereof." It also requires that the testator "bid the persons present, or some of them, bear witness that such was his will, or to that effect."

The *rogatio testium*, or request of the testator to bear witness to the will he is about to pronounce, is an essential feature of all nuncupative wills, but any form of expression, however imperfectly uttered, so that it conveys to the minds of those to whom it is addressed the idea that he desires them, or some of them, to bear witness to the disposition he is about to make of his property, is sufficient. It has been decided in Pennsylvania that a look is not a sufficient *rogatio testium*. The *animus testandi* must be proved as clearly, and with the same certainty, at least, as in wills written and attested in writing.

"That such nuncupative will was made in the time of the last sickness of the deceased, in the house of his habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick being from his own home, and died before he returned to the place of his or her dwelling." This provision has, of course, no application to soldiers or mariners; but with this exception has been substantially incorporated into the statutes of nearly all the States.

The Statute of Frauds prohibits the introduction of any testimony to prove testamentary words after the expiration of six months from the time they were spoken, "except the said testimony, or the substance thereof, were committed to writing within six days after the making of said will."

While the substance of this provision is embodied in the

statutes of most States, there is considerable diversity as to the time allowed for the reduction of the testamentary words into writing.

Nuncupative wills are watched by the courts with a jealous eye. Aside from the statutory restrictions placed upon them, the ease with which frauds may be accomplished in establishing them demands close scrutiny of the testimony offered, and strict proof of every fact upon which their validity is made to depend. Where several witnesses are required by the statute, each one must prove all the facts, and all must be present at the same time.

§ 42. Wills of Soldiers and Mariners. — Wills made by soldiers in actual military service and mariners at sea are construed with greater liberality than nuncupative wills of other persons. By the civil law the ordinary formalities of executing nuncupative wills were dispensed with in favor of soldiers; their wills were held valid, although they should neither call the legal number of witnesses, nor observe any other of the ordinary solemnities in the execution of such instruments. This privilege was also extended to the naval service; and has been generally adopted among civilized nations, coming to us through the common law, left substantially unaffected by the English Statute of Frauds.

In the absence of statutory regulations on the subject, the usual conditions to nuncupative wills are not applicable to the wills of soldiers or mariners, the single question being whether the deceased comes within the class of persons under consideration, namely, whether he was a soldier in actual service or a mariner at sea, of whatever rank or grade.

Nuncupative wills of soldiers and mariners may be proved, like wills of personalty at common law, by one witness.¹

§ 43. Codicils. — A codicil is some addition to or qualification of a last will. Whatever may have been the origin of this species of testamentary disposition, they have, in America, no other function or office, and are governed by the same rules, and must be executed with the same formalities, as the wills themselves of which they form a constituent part. They are *prima facie*

¹ In *Ex parte Thompson*, 4 Bradf. 154, the Surrogate gives a concise review of the history of unwritten wills.

dependent upon the will; the destruction or mutilation of the will is an implied revocation of the codicil.

One of the most important offices which a codicil may perform, as part of a pre-existing will, is the effect ascribed to it of confirming or republishing such will. Being, in law, part of a man's will, whether so described in the codicil or not, or whether or not expressly confirmatory of it, it furnishes conclusive evidence of the testator's considering his will as then existing, whether cancelled by obliteration (if it continues to be legible) or otherwise. And for the same reason it operates to establish a will which would be void for want of compliance with the law regulating its execution and attestation, because the codicil, speaking and operating from the time of its execution, brings the will to it and makes it a will from the date of the codicil. The codicil, to have such effect, must self-evidently refer to the will with sufficient certainty to identify it; but it is not essential that the two papers be fastened together, or that the codicil be written on the same paper or parchment with the will. But if there are several wills of different dates, the circumstance of annexation is powerful to show that it was intended as a codicil to the will to which it is annexed, and to no other. If not annexed to any will, the codicil, where no express date is mentioned, refers to the will latest in date; if there is, to that of the date expressed.

The presumptions pointed out yield, of course, to any express or plainly inferable intention of the testator. A codicil does not republish any part of a will which is inconsistent with the codicil, but necessarily revokes it; nor does it necessarily operate as if the will had originally been made at the date of the codicil.

CHAPTER VI.

OF THE REVOCATION OF WILLS.

§ 44. **Methods of Revocation.** — The power to revoke a will is self-evidently co-extensive with the power to make one. It follows from the ambulatory quality of the instrument that a later will supplants a former one precisely to the extent (and to that extent only) to which the later is inconsistent with the former. It is always the *last* will and testament which controls.

Revocation may also be effected by other means if the testator does not wish a mere alteration or change in the shape of his testamentary disposition, but an entire revocation, leaving it to the law to regulate the descent of his property. In such case the revocation is accomplished by the cancellation or destruction of his will, without more.

Revocation also follows by operation of law from any subsequent act of the testator to the extent that such act is inconsistent with the devise or bequest.

Sometimes a revocation of a will may arise also from changes in the family relations of the testator occurring after execution of the will, unless by some act of the testator or provision in the original will the presumption of law is rebutted.

§ 45. **Revocation by Cancelling, etc.** — The statutory enactments in most States follow the language, or re-enact the substance, of the English Statute of Frauds in respect to the revocation of wills by act of the testator, which provides that "no devise in writing of any lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction or consent," etc.

To constitute cancellation there must be in the testator's mind an intention to cancel, and also a physical act adequate

under the statute. "All the destroying in the world without intention will not revoke the will; nor all the intention in the world without destroying: there must be the two."¹

As regards the physical act, the obliteration, cancellation, or destruction of any essential formal part of a will, without which such will would be inoperative, constitutes a revocation of the whole will. Such act is inconsistent with any other intention than that of destroying the will in its entirety. So the tearing of a seal from a will, although a seal is not essential to its validity, has been held a revocation, because the testator, deeming it essential, indicated his intention of destroying the will by tearing off the seal.² Where the signature is cut out of a will it is revoked. Pasting it into its former place will not revive the will. It must be executed afresh, including attestation.

But, of course, wherever the statute specifically directs the manner of cancellation, it must be strictly pursued, and no inquiry is permitted as to the intent of a testator in a destructive act not coming up to statutory requirements.

Though the destruction intended by the testator be frustrated by fraud, as for instance when the testator burned an envelope from which the will had been surreptitiously removed, the testator never doubting that he had burned his will, revocation is not accomplished.³

If the physical act complies with statutory requirements, it must still appear that the testator intended it. If, therefore, the act of destruction was not committed *animo revocandi*, but by accident, mistake, during a fit of insanity, or where it is the effect of handling or wear, it is not the testator's free act, and does not affect the validity of the will destroyed. For the same reason a revocation obtained by undue influence on the mind of the testator is inoperative, and leaves the will in full force.

Of course the destruction of a will by any one except the testator, acting without his knowledge or approval, cannot affect the will.

¹ Dr. Deane as quoted in *Throckmorton v. Holt*, 180 U. S. 552, 582.

² *Avery v. Pixley*, 4 Mass. 460, 462. *A fortiori* where a seal is required: *White's Will*, 25 N. J. Eq. 501.

³ *Graham v. Burch*, 47 Minn. 171, 174.

If the will is executed in duplicate, the destruction by the testator of the only copy in his possession raises a presumption that it was done *animo revocandi*. But where the testator with both copies in his possession, destroys only one, leaving the other intact, the inference that the act was done *animo revocandi* is very weak, if indeed it exists at all. If done with intent to revoke, the destruction of one of several copies accomplishes the testator's object.

The presumption of destruction *animo revocandi* arises also when a will which has been traced to the testator's possession cannot be found after his death, or is found torn; but this presumption may be rebutted by evidence showing a contrary or different purpose. But if the will was shown to be out of the testator's possession, the party asserting the fact of revocation must show that it came again into its maker's custody, or was actually destroyed by his direction.

§ 46. **Dependent Relative Revocation.** — The cancellation of a will, or of part of a will, made with the intention to execute a new will (as a step in the process of effecting a change in the testamentary disposition already made), will not be deemed a revocation, if the purpose of the testator fails. This principle is stated by Williams to have resulted in "the doctrine of dependent relative revocation, in which the act of cancelling, etc., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not."¹

The doctrine can be applied only where the intent to change was the testator's exclusive intention; where, if that intention was not effectuated for any reason, he would have preferred to leave the will as it stood. The abstract theory has not been repudiated, but modern courts are not inclined to infer the mental attitude on the part of the testator necessary to constitute dependent relative revocation.

§ 47. **Partial Revocation by Cancelling.** — A will may be revoked in part by cancelling or obliterating a portion thereof, leaving the unobliterated portions in force. Even where a portion of the will is cut out, with the intention of annulling such part only, the remainder, if enough is left to constitute

¹ Williams on Executors [148].

an intelligible disposition, is a valid will. This rule is not recognized in some jurisdictions.

But a partial change in the will can only be effected by cancellation; any addition or substitution is a new will, and invalid without republication.

Any change in a will by any one but the testator (without authority) is a nullity; the will stands as before the change, with perhaps one exception; which is that when a beneficiary under a will tampers with a clause conferring a benefit on him, he loses all claim under that clause as it originally stood. He does not lose the benefit of other provisions of the will in his favor; nor can the punishment visited on him affect the rights of others under the will as it stood before the change.

When a will is offered for probate with alterations on its face, the acceptance or rejection of the alterations depends on the fact whether or not they were made before execution of the will. Gradually escaping from the severe doctrines of the common law in regard to all alterations of instruments, modern courts incline to the view of indulging in no presumption on the question of when the alteration was made, imposing upon the propounder of the instrument the burden of explaining all suspicious alterations. Where an interlineation in a will is fair upon its face, and it is entirely unexplained, there being no circumstances to cast suspicion upon it, it would not be proper to hold that the alteration was made after execution; and such interlineations as supply a blank in the sense must be distinguished from those that would indicate a change in intention.

§ 48. Revocation by Subsequent Will. — It is usual to insert in wills a clause revoking all prior wills. Even without such clause, a later will necessarily revokes so much of the former will as is inconsistent therewith, but only so much. If it disposes of the whole estate it necessarily totally revokes prior wills. If it makes only partial dispositions, not inconsistent with portions of prior wills, provisions of the former not inconsistent with the later one stand; so that "any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the

deceased.”¹ Subsequent wills, indeed, perform the office of codicils.

The subsequent will without a revoking clause may under circumstances revoke inconsistent provisions of a prior will, even when the conflicting provisions of the later will must fail. Thus, where a testator, having devised property to a person, subsequently devises it to another person who is incapable of taking, the devise in the later will must fail, but it is sufficient to revoke the former devise. If a will with a revoking clause failed in all its affirmative dispositions, the deceased would be intestate, as the revoking clause alone operated to revoke the prior will.

The revoking will, to be effective, must be executed and attested with the formalities prescribed by the statute for the testamentary disposition of the class of property disposed of in the former will. Thus, where the statute creates a difference in the execution and attestation between wills of realty and of personalty, a will executed with necessary formalities for one but not the other of these classes, is not sufficient to revoke a will of the latter class.

It is held that the revocation of a will may be proved by proving the execution of a subsequent will by the testator, which is lost, and has not been, therefore, admitted to probate. This rule is necessarily confined to cases where the subsequent will either expressly revokes the former, or contains an inconsistent disposition of the whole estate, as by appointment of an executor and residuary legatee; and the evidence to establish its execution, as well as its inconsistency with the former will, should be clear and satisfactory, and, particularly if by parol, it must be stringent and conclusive. There can be no revocation by a later will of which the contents are unknown; the words “this is my last will” are held not to import an inconsistency of disposition between the two instruments.

§ 49. Revival of a Prior Will by Revocation of a Later Will. — A revoking will is ambulatory, and so it would seem must be the revocation itself. If the ambulatory revocation is itself revoked, it leaves the prior will unrevoked. What then is the effect of the cancellation of a revoking will upon the prior will?

¹ Williams on Executors [162].

It should revive the prior will if such was the testator's intent. There has been much division between courts as to presumptions concerning that intent. It was held in common-law courts that the destruction of the revoking will revived the prior will, making a conclusive presumption as to intention, against which no evidence would be received, while the ecclesiastical courts inclined to a different doctrine, holding that the presumption is against the revival of the prior will, and throwing the burden of proving the intent of the testator upon the parties claiming the revival of the prior will. A third view was finally adopted, according to which it is regarded as a question of intention, to be collected from all the circumstances of the case, unaided and unembarrassed by any legal presumption. American cases are hopelessly divided on the question where no statute controls.

In England the Wills Act (1 Vict. c. 26) provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by re-execution, or by a codicil executed as required by the act, and showing an intention to revive the same. A number of States have adopted statutes based on the English one just cited. Under some of these statutes written evidence from the testator of his intention, made at the time of the cancellation of the revocatory will, is sufficient to reinstall the prior will without republication.

§ 50. What Property passes under Will. — At all times under English law the will applied to all personalty held by the testator at his death; but under common law and early English statutes the devise of such land only passed under the will as the testator owned at the time of making it and continued to own until his death; if therefore a testator aliened the devised land, although he subsequently acquired a new freehold interest therein, yet the devise was void.

But the law has been changed by statute in this respect both in England and in nearly all of the United States. The will operates now on such portion of the estate as the testator may have power to dispose of at his death, including of course all lands acquired since the will was made, if such appears to be the testator's intention.

§ 51. **Revocation by Inconsistent Disposition of the Testamentary Gift.** — The disposition of property, which is covered by the terms of a will, by the testator in his lifetime is a revocation of the will so far as that disposition goes. So a complete sale of realty devised clearly revokes the will in that particular.

Questions can arise only when the disposition is inchoate or partial.

Where the estate devised is contracted to be conveyed, and the purchase money remains unpaid, either wholly or in part, the unpaid purchase money goes to the personal representative of the testator and not to the devisee, because, under the doctrine of equitable conversion, the purchaser is regarded as a trustee of the purchase money for the vendor. But in a number of States the rule is changed by statutes, which substantially enact that a contract or bond for the conveyance of real estate previously devised shall not be deemed a revocation of such devise unless such intention shall clearly appear, but such property shall pass to the devisee subject to the right of the purchaser to enforce specific performance of the contract of sale to the same extent as could have been done against the heirs, and all purchase money unpaid at the time of the testator's death goes to the devisee.

So too, apart from statutes, it has been held that a charge or incumbrance (usually passing legal title) on devised realty works a total revocation; but in many States it is enacted that the property passes to the devisee subject to the charge. The subject is treated more fully elsewhere.

§ 52. **Revocation by Marriage of Feme Sole.** — At common law, the marriage of a *feme sole* revokes any will previously made by her, although she survive her husband, and although the husband at the time of the marriage agreed that the marriage should not revoke the will. In some States statutes abolish this rule, and in many others the same result has been reached without express statute, on the ground that the removal of the disabilities of married women has ended the rule by wholly changing the conception of a married woman's legal status, on which the rule is based.

§ 53. **Revocation by Marriage of Males and Birth of Issue.** — As early as 1682 the rule of the civil law that where a man

made his will and afterwards married and had issue, and died leaving wife and issue unprovided for, this should be considered as an implied revocation of his will, was introduced into the courts of England, and subsequently adopted in the common-law courts. The birth of a posthumous child did not meet the requirement of birth of issue. The will was not avoided by such posthumous birth. But birth of issue during the marriage was sufficient for revocation. Though the testator left no issue surviving him, the rule still held good.

It was long doubtful whether this rule raised merely a *prima facie* presumption as to the testator's testamentary intent, thus allowing evidence of the testator's intent to have his bachelor will stand notwithstanding the marriage and birth of issue; or whether it was a conclusive presumption, a matter of law, precluding all evidence as to the testator's real intent. In England the latter view was held in the case of *Martin v. Roe* (8 Ad. & El. 14, 54), and the ruling has subsequently become embodied in the statute. Under this view a settlement for wife and children made at or after marriage is not sufficient to prevent the revocation of the will.

The rule evidently rests on the idea that dispositions made by a single man not contemplating matrimony cannot be expressive of his will when he has married and has issue. If then the will of a single man makes provision for his marriage and issue thereof, the reason for the rule fails; the will thus made prior to marriage is not revoked by marriage and birth of issue.

The American statutes vary greatly on this point. In general the principle stated, with statutory modifications which it will not be attempted here to detail, is recognized. One statutory change is however worthy of notice. A number of States leave the will in force when the issue of the marriage does not survive the testator. The technical reasoning for the rule is that when the will is once cancelled by the birth of issue no subsequent event, short of republication, can revive it. As for the widow, it is recognized that the law adequately provides for her against any will. The statutes therefore which proceed on the basis that no wrong has been done, and that there is therefore no reason for cancellation of a bachelor's will, where no

issue of a subsequent marriage survives, seem to cover the situation practically.

§ 54. **Consequence of Failure to provide for Issue.** — By decided weight of authority it seems that, apart from statutes, the will made by a man after marriage is not revoked either wholly or *pro tanto* by subsequent birth of issue. But it is believed that none of the States have failed to make statutory provision on this point.

Few, if any, States (except Louisiana) deny the parent's right to disinherit children at his pleasure. The effect of failure to make provision for children in a will rests on a technical presumption that such failure is some oversight or accident. Not only has a parent a right to disinherit a child in express terms, but whenever he shows that intention clearly in his will, though the child or children, living or to be born, are not expressly named, the will stands, and the statutes next mentioned do not apply.

Most States provide that when issue is born to a testator subsequent to the making of his will, the will shall be revoked *pro tanto*; that is, the pretermitted child takes as if the deceased had died intestate, and after the claims of such child are satisfied, the balance of the estate is divided in accordance with the provisions of the will. In many States no distinction is drawn between children born after the making of the will, and such as have been pretermitted, though in existence when the will was made; nor between children and the issue of deceased children. Posthumous children are usually held to be protected by the statutes.

§ 55. **Republication of Wills.** — A will revoked by the legally expressed intention of the testator or by implication, as above set forth, may be restored. But the will so republished is a new one; and the validity of the republication involves all elements requisite for making of an original will. As to form all requisites for signature and attestation of the original will must be complied with; and if the party attempting to republish did not at the time have a disposing mind, or if the republication was the result of undue influence, these facts will render the republication as ineffective as would the same objections applied to the probate of an original will.

It has been said before that a valid codicil affirming a prior testamentary disposition, which was defective for formal reasons (*e. g.*, inadequate witnesses), or indeed inherent ones (*e. g.*, undue influence), makes that prior testamentary disposition an effective will. Logically it republishes the prior document. It is but an application of this doctrine to a special state of facts to say that an inherently and formally valid codicil republishes a will to which it refers and validates it, even though that will has been revoked, as for instance by marriage and birth of issue.

BOOK TWO.

OF GIFTS EXECUTED IN ANTICIPATION OF
IMMEDIATE DEATH.

CHAPTER VII.

DONATIONES MORTIS CAUSA.

§ 56. **Definition of the Term.**—A *donatio mortis causa* has been defined as “a gift of personal property made by a person in peril of death and in expectation of an early demise, consummated by a manual delivery of the subject of the gift or of the means of obtaining possession of the same by the donor, or by another person in his presence and by his direction, to the donee, or to a third person for the donee, and acceptance on the part of the donee, and defeasible by reclamation, the contingency of survivorship, or delivery from the peril.”¹ It is thus neither a testamentary disposition, since it passes title before death, nor a gift *inter vivos*, since it is revocable.

The legal recognition of this form of disposing of property, as the retention of the Latin name indicates, has come down to us from the civil law. It has never been favored in law. It was carefully guarded under the Roman law, which invalidated every such gift unless proved by five witnesses present at the time, with other stringent requirements. Such strictness of proof is not required by the common law; but courts regret that this species of gift has not been swept away by the Statute of Frauds, and are very cautious to require positive, clear, and satisfactory evidence in establishing it, to guard against fraudulent pretenses in claiming the property of deceased persons. But when found to be made in good faith, they must be upheld.

The essential elements of such a gift, as stated in the fore-

¹ Thomas Frazer Reddy, 21 Am. L. Rev. 734.

going definition, next require consideration. These are apprehension of death and delivery of the thing given.

§ 57. **Apprehension of Death.** — The first requisite to a valid *donatio causa mortis* is, as indicated by the name, that it be made under apprehension of the donor's death from an existing illness or peril. If a gift is made with the view that it take effect upon the donor's death, but while in ordinary health and not in immediate apprehension of death, it may be a valid gift *inter vivos*, but cannot be *mortis causa*. But it is not necessary that there should be an expression of the donor's apprehension of death; if the gift is made during his last illness, or while in danger of death from any other cause, it will be presumed to have been made in apprehension of death. Nor has the rule applicable to nuncupative wills, according to which the legacy is valid only when made under circumstances rendering it impossible to make a written will, any application to gifts *mortis causa*.

The validity of the gift is not affected by the time intervening between the delivery and the happening of the donor's death; the only condition is that there be no recovery from the illness, or escape from the peril then impending, which induced the gift.

Since the gift *mortis causa* is conditioned to take effect upon the donor's death by the existing disorder or peril, it is obvious that it is revocable, before the happening of that event, at his pleasure; and if it be inferable from the circumstances that an irrevocable gift was intended, it can be sustained only as a gift *inter vivos*.

§ 58. **Delivery of the Thing Given.** — There can be no valid gift *causa mortis* without actual manual delivery of the thing given, or some act equivalent thereto.

Real estate cannot be the subject of such a gift, one sufficient reason being that it is incapable of manual delivery.

With regard to goods and chattels, and tangible property generally, to which things the application of this principle was originally limited, it is held that a literal delivery of the gift itself is exceptionally excused where it is impracticable. In such case the delivery of the tangible thing which gives access to the gift has been held to satisfy the law. It is a constructive

delivery. Thus the delivery of the key of a room containing furniture has repeatedly been held such a delivery of the furniture as will support a donation of it *mortis causa*.

The test for allowing constructive instead of manual delivery would seem on principle to be the same in cases of gifts *mortis causa* as in cases of gifts *inter vivos*. There is no such thing as symbolical delivery, in spite of an early case to the contrary. The delivery of a part in the name of the whole, as a ring from the stock of a jeweler, cannot stand, no matter what the accompanying circumstances.

Formerly it was held that choses in action were as incapable of delivery as real estate. The ancient rule concerning choses in action required an assignment in writing or something equivalent thereto in the form of writing, and an actual execution of the transfer to give validity to the gift. But since the equitable doctrine has prevailed that choses in action are assignable by the delivery of the evidence of the grantor's right, a gift *causa mortis* becomes valid by such delivery, and may be enforced like any other assignment in equity. Hence promissory notes of third parties may be given *mortis causa*, even without the donor's endorsement. So also checks or drafts of third persons, certificates of deposit payable to the bearer, or payable to order and endorsed by the payee, or without endorsement, bonds, notes secured by mortgage, life insurance policies, and certificates of stock.¹ In all these cases the paper in question may perhaps be viewed as the thing itself which is given; but if that view is not sound, it is clearly true that such paper puts the donee in control as fully as the transfer of the key to a room transfers its contents. Even the delivery of the donor's book of current deposits in bank is generally held, though with some dissent, to be sufficient to give the donee title to the fund in bank.

Clearly the donor's own note payable to the donee cannot be the subject matter of a gift *causa mortis*. Back of the form, it is essentially only a promise to give.

§ 59. Parting with Control. — The donor must not only make physical delivery, but he must part with all control. The gift is indeed capable of revocation at the donor's pleasure, but until

¹ Cases are cited in Woerner on Administration, § 59.

it is revoked in some way the gift, and the donee's control, must be absolute. This is well illustrated by the case of *Basket v. Hassell*, 107 U. S. 602, l. c. 614. A certificate of deposit payable to the donor was endorsed by him: "Pay to Martin Basket . . . no one else; then not till my death. . . . I may live through this spell. Then I will attend to it myself." There was physical delivery and no revocation; the donor died. Yet the gift was invalid, since Basket had not full control. Under that endorsement he could not have collected the deposit when he received it.

§ 60. **Delivery to Person other than Beneficial Donee.** — When the donor delivers the gift to his agent with directions to turn it over to the donee, the gift is clearly not complete until the donor's agent has actually made delivery to the donee, and must fail for want of such delivery. But when the recipient of the gift receives it as agent of the donee and not of the donor, the interest passes immediately to the donee for whom from the moment of such delivery the recipient is mere bailee. In such case the gift is complete on delivery to the recipient, accepting on behalf of the ultimate donee. The case is clear as a matter of law, though the state of facts may often be involved in doubt.

A gift *causa mortis* may also be made to a trustee upon trusts declared by the donor. The delivery to the trustee perfects the formal gift. The trust may be invalid, owing to vagueness, to contravention of some public policy, or to any other cause. But on such questions the law is the same in gifts *causa mortis* as it is in testamentary trusts, in which latter connection it will be discussed.

§ 61. **Revocation by the Living Donor.** — When all requisites for a gift *causa mortis* have been complied with, the donor while living still has the right to revoke it, with or without reason. But the revocation does not result from the mere will of the donor, however clearly declared. There must be a demand for redelivery made on the donee in some form. On the other hand it is not necessary that the donor should recover actual possession of the gift. The gift is cancelled though the donee refuses to surrender the article given him.

But the power of revocation must be exercised while the donor

is living. It cannot be revoked by last will and testament, although there be a different testamentary disposition of the specific thing given *causa mortis*, because the will speaks as of the moment of the testator's death, which has vested the previous gift irrevocably in the donee.

§ 62. **Revocation by Law.**—As before stated, a gift *causa mortis* can only be made in apprehension of death. The recovery of the donor from the illness, or the delivery from the peril which induced the gift works its revocation of itself without any act on the part of the donor; and this too, although the recovery be temporary, and death finally ensue from the same cause.

The death of the donee occurring before that of the donor likewise operates a revocation, similar in effect to the lapsing of a bequest by the death of the legatee before that of the testator.

It has been held that the *donatio mortis causa* partakes of the nature of legacies to the extent of being revocable by the subsequent birth of issue to the donor, where such would be its effect on a prior will.

§ 63. **Liability of the Gift to Donor's Creditors.**—Like gifts *inter vivos* and legacies, gifts *mortis causa* are subject to defeasance in favor of the donor's creditors, because, as against them, one cannot give away his property. Donees *causa mortis* take their title to the property subject to the contingent right of the administrator to reclaim it, and are bound to have it forthcoming when required for the payment of debts to the extent of such debts.

§ 64. **Validity of the Gift as against the Donor's Family.**—To what extent such gifts will be permitted to interfere with the rights of widows and infant children of the donor, does not appear very clearly. Chief Justice Shaw expressly held that the right of the widow is to the property of which the husband died seized or possessed; and because gifts *causa mortis* have their full effect in the lifetime of the donor, they do not impair the rights of the widow.¹ On which Judge Redfield remarks: "It seems to us very questionable whether a man of substance can be allowed to dispose of his whole estate, and leave his widow

¹ Chase v. Redding, 13 Gray, 418.

a beggar, by the means of this species of gift, which is clearly of a testamentary character, where the statute expressly provides that the widow may waive the provisions of the will and come in for her full share of the personal estate, under the statute, by way of distribution." ¹ In some States the widow's rights have been held to prevail over such a gift; and a conveyance by the husband, whether *mortis causa* or *inter vivos*, will be set aside as in fraud of the wife and family when made in expectation of death with a view to defeat the widow's right under the statute to a share in his estate.²

¹ 3 Redf. on Wills, 323, pl. 3, note 7.

² *Straat v. O'Neil*, 84 Mo. 68, 71. See Woerner on Administration, § 63.

PART II.

OF THE DEVOLUTION BY OPERATION OF LAW.

CHAPTER VIII.

DESCENT AND DISTRIBUTION OF PROPERTY OF INTESTATES.

§ 65. **Principles governing Distribution.** — In default of the testamentary disposition of the property of a deceased person, the law disposes of the same precisely as the deceased himself would do if acting rationally, and without motive or influence of an extraneous nature. The family of a person have claims upon him while living which are recognized, and to a great extent enforced, by the law: a man may be *compelled* to provide for his wife and children the necessities for their support and comfort, and for the proper education of his children. But he may freely alien any of his property during his lifetime, even, as has been shown, on the very point of death, or dispose of the same by last will, subject only to such restrictions as the law imposes for the protection of the wife and surviving minor children. The statutory law of England and America (except in the State of Louisiana) *allows* gifts and devises or bequests, in derogation of the interest of his own family, to a greater extent, perhaps, than any other of the civilized nations; nevertheless, its presumptions and intendments, whenever occasion exists for the application of such, are in favor of the family. Thus it is the family which furnishes the basis and content of the law regulating the devolution of the property of intestates.

This subject is so thoroughly treated in the statutes of every State of the Union that there is neither room nor occasion for an extensive general discussion of its principles apart from a reference to their provisions. But it may be necessary to bear in mind that in most of the States the statutes of descent and distribution are subject, and to be construed in connection with,

the law concerning dower, curtesy, partnership, homestead, and exemption, and particularly to the peculiarly American provisions in favor of the widow and minor children for their immediate support, which will be noticed hereafter.

§ 66. **Sources of American Law of Descent and Distribution.** — The term "descent" is applied to devolution of real estate when the owner has died intestate, while distribution is applied to the division of his personalty. Descent of real estate is regulated in England by the common law. Its cornerstone is primogeniture; and carefully formulated rules, mainly of feudal origin, provide for all contingencies. Distribution of personalty in England is governed by the Statute of Distribution (22 and 23 Charles II). In the United States primogeniture exists nowhere; and the whole common law of descent is superseded, save that it has had influence in settling our law on a few points of relatively small importance. With very few exceptions realty and personalty of intestates ultimately go in the United States to the same persons under rules common to both classes of property. In every State there are statutes under which the division is made. These statutes are in the main modelled after and mostly approximate in their general results the English Statute of Distribution, which in its turn is mainly borrowed from the law derived from Rome, so that the construction and the practice under it have been governed to a great extent by the principles of the Roman law and its derivatives. These State statutes are exceedingly diverse in their details. All that is here attempted is the discussion of the general plan, with occasional reference to a sharp contrast on some important point.

§ 67. **The Degrees of Relationship.** — The central thought of these Statutes of Descent and Distribution is to give the property of the intestate to his nearest relatives. The method of determining degrees of kinship must therefore be considered. First, affinity and consanguinity are distinguished. Consanguinity requires that the persons concerned have a common ancestor. Where there is no common stock, the relations in the family rest on affinity. The law of distribution ignores affinity (with sole exception of the husband or wife), and deals with consanguinity only. Consanguinity may be lineal or collateral.

Lineal consanguinity subsists between persons one of whom is descended in a direct line from the other. Such is the relation of the intestate to his parents, grandparents, and so on, in the ascending line, and to his children, grandchildren, and so on, in the descending line. There can be here only one way of fixing the degree of relationship. The intestate is related in the first degree to children and parents, in the second to grandchildren and grandparents, and so on. Collateral kindred are descended from the same stock or ancestor, but not from each other. The common ancestor is the *stirps* or root from which these relations are branched out. Thus the intestate is collaterally related to his brothers and their descendants (the intestate's nieces, nephews, etc.), with the father as common ancestor; to his uncles and their descendants (the intestate's cousins, etc.), with the grandfather as a common ancestor and so on.

§ 68. **Collateral Relationship under Canon and Civil Law.** — The method of computing the degrees of collateral kindred is the same at the common as at the canon (ecclesiastical) law, from which it has been adopted, and begins with the common ancestor reckoning downward. In whatever degree the claimant is distant from the first ancestor common to him and the intestate, that is the degree in which they are related. But if there are more degrees between the intestate and the ancestor than between the ancestor and the claimant, then the degrees are reckoned between the intestate and the ancestor; or, in other words, in counting upward from the intestate to the ancestor, and downward from the ancestor to the claimant, the longer of these two lines indicates the degree of consanguinity.

The civilians count upward from the intestate to the common ancestor, and from him downward to the heir, reckoning one degree for each step taken, adding the degrees in the ascending line to those in the descending line, and the sum indicates the degree of consanguinity between the intestate and the person whose heirship is to be established.

These systems of course produce different results. The intestate is related to his uncle by the canon and common law, taking the longer line, in the second degree; by the civil law, taking the sum of the lines, in the third degree.

§ 69. **Representation.** — Should the intestate leave children

together with descendants of a predeceased child, it seems obviously right that the grandchildren of the intestate should take the share which would have gone to their parent, had he survived. They are said to take by representation. In its broadest terms the doctrine of representation is that whenever one of a class entitled to distribution has died before the intestate, leaving issue which survives the intestate, such issue shall take the share which the predeceased ancestor would have taken if living at the death of the intestate. But the doctrine is rarely recognized in this broad form. On the one hand there are limitations as to the deceased relatives who can thus be represented, and on the other, when representation is allowed, as to the remoteness of the claimant in descent from the ancestor he would represent. Can the children of a predeceased cousin claim? If so, can his grandchildren?

In case of lineal consanguinity, in the descending line, there is no limitation on the rule; but under the English Statute, as construed by the courts, in case the claimants are collaterally related to the intestate, representation applies to children of deceased brothers and sisters of the intestate; not to grandchildren of brothers and sisters, and not to children of remoter relatives. The English rule is adopted in many States. It is variously modified in others, in some, as in Missouri, going so far as to apply the rule in its unrestricted form as above given.

It remains to notice another consequence of the rule allowing the children of deceased parents to take the parent's share by representation, applicable equally to lineal and collateral heirs taking by representation. If the heirs all stand in the same degree of consanguinity to the intestate, and take in their own right (none of them by representation), they take equal shares (*per capita*); hence the three children of a deceased sister of the intestate and the only child of a deceased brother take each one-fourth part of the estate, in disregard of the number of those who may spring from a common parent, because in establishing the degree of kinship they do not represent such parent. But if one or some of the heirs claim in their own right, — that is, by virtue of their degree of consanguinity, — and the claim of others rests upon the representation of a deceased parent or ancestor, who, if living, would be in that degree, then such repre-

sentatives take *per stirpes*, — that is, collectively as much as the deceased parent or ancestor would have taken, — while the former take *per capita*. The whole estate in such case is to be divided by the sum of the number of those claiming in their own right *plus* the number of *stirpes* represented by descendants, the descendants collectively of each *stirpes* taking his share. So that the thirty-two nephews and nieces of an intestate, and the twenty-five grand-nephews and grand-nieces and unknown heirs of a deceased niece, take, the former *per capita*, the latter *per stirpes*.¹

§ 70. **Statutory Modification of System of Distribution.** — The canon (and common) law as to fixing the degree of kinship is at the base of most of our American Statutes, but within the limits of the immediate family, the theory has yielded to ethical considerations.

Thus parents and children, according to the scheme, are both related to the intestate in the first degree; but all States leave the property to the descendants of the intestate to the exclusion of everybody else.

Again, where the intestate leaves no descendants, the relative rights of brothers and sisters on the one hand as against parents on the other, present an ethical problem which would probably receive its answer in accordance with the varying circumstances of each individual case. But of course there must be an unbending rule. Every State meets the situation, but the varying statutes cannot here be collated. As an example, Missouri makes division in equal shares between father, mother, brothers, and sisters.

The scheme of relationship deals only with consanguinity. It has no place for the surviving husband or wife, related to the deceased, if indeed at all, only by affinity. It is true the surviving husband or wife has rights, at common law and under statutes, in the property of the deceased spouse, which have priority over the distribution of the estate. But even with this provision in view, it would hardly seem just to give the bulk of the property of the intestate to distant relatives, of whom perhaps he had no knowledge, to the exclusion of the husband or wife. Accordingly all States introduce husband and wife some-

¹ Copenhaver v. Copenhaver, 9 Mo. App. 200.

where into the schedule of distributees. It may be higher or lower in the scale; the husband may appear at a different point from the wife. The statutes must be consulted. As an example, Missouri places the surviving husband or wife after the intestate's father, mother, brothers and sisters, or their descendants.

§ 71. **Heirs of the Half Blood.** — Brothers and sisters having the same father and mother are related to each other by the whole blood; if they have the same father but a different mother, or the same mother but a different father, they are related to each other by the half blood. This difference in the consanguinity of collateral kindred has given rise to some divergence in the laws of different countries regulating the devolution of property. Under the artificial system of the common law, collateral kindred of the half blood were entirely excluded from the inheritance of land, while in the distribution of the personalty no distinction is recognized between brothers and sisters of the whole blood and those of the half blood; "for they [the half blood] are of the kindred of the intestate, and only excluded from inheritances of land upon feudal principles."¹

In many, if not most, States the law has been changed so that the half blood take their share of realty as well as personalty equally with the whole blood.

A number of States postpone the half blood to the whole blood both as to personalty and realty, allowing the half blood, however, to take to the exclusion of the next class in distribution whenever there are none of the whole blood, and usually where there are no descendants of the whole blood.

Another class of States (including, for instance, Missouri) allow one of the half blood to take half the share coming to one of the whole blood both as to realty and personalty; so that, for example, where the intestate has left only one brother of the whole blood, and one of the half blood, the former will take two-thirds and the latter one-third.

Another widely prevailing exception, referring to ancestral estates, is mentioned *post*, § 76.

§ 72. **Posthumous Children.** — Children of the intestate born after his demise are entitled to claim in descent and distribution as if born in his lifetime. In a number of States the doctrine

¹ 2 Bl. Com. 505.

is limited to the intestate's children, and does not avail the children of any one else who would have been a distributee had he not died before the intestate; in others all distributees are included.

Questions sometimes arise in respect to the validity of the disposition of property in which a posthumous child has an interest, in the interval between the parent's death and the birth of such child. If a sale is made by all the existing parties in interest as an extra-judicial transaction, it cannot affect the interest of the after-born child. Such interest did not pass by the sale. But sales made under the decree of a court having jurisdiction have been upheld as passing the interest of the after-born child, though it could not be made a party to the proceeding by name. In *Knott v. Stearns*, 91 U. S. 638, this ruling is rested on two grounds: First, technically, the child possessed no interest till born; its interest attaches merely to the proceeds of the property in the shape it may be when he is born; Second, there is a theory in equity, recognized in most States, that parties in being, possessing an estate of inheritance, are regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties; and that a court of equity may bar, by its decree for sale, the interest of unborn contingent remaindermen, who, of course, could not be made parties.

§ 73. **Adopted Children.** — Provision is made in the several States for the legal adoption of children by others than their parents, whereby they become members of the family of the person or persons so adopting, and by force of the statute entitled to all the rights accorded by the law to natural children, including the right of inheritance. So far as their own footing in this respect is concerned, it is precisely equal to that of other lawful children; and hence they take no share of an estate willed to others, if they are intentionally omitted in the will. It has been held that the right of inheritance does not extend to inheritance by representation through the adopting father, from another person.

There is conflict as to what becomes of the estate of such adopted child when it dies intestate without issue. A Missouri

decision gives the property of such adopted child to its relations by blood,¹ and not to those by adoption; while in Indiana the contrary is held, that the adopting parents take, and not the natural parents.²

Adoption statutes are construed liberally in favor of adopted children, so far as the adoptive parents are concerned; but strictly against adoption rights through third persons, at least so far as inheritance is concerned.

Adoption creates a status. Under well-established principles of interstate law, if it is valid by the laws of the State where made, it follows the adopted child into any other State where it may subsequently acquire a domicile.

§ 74. **Illegitimate Children.** — According to the common law an illegitimate child is *filius nullius*, and can have no father known to the law; he has no inheritable blood, and can therefore be the heir to neither his putative father nor mother, nor any one else, and can have no heir but of his own body. The rigor, not to say cruelty of the civil law, which denied even maintenance to the fruit of incestuous intercourse, and of the common law, allowing a bastard no rights but such as he himself acquires, and rendering legitimation impossible, although the parents marry after birth, has been much relaxed in the several States of the Union.

There are, in the first place, statutes that wholly remove the bar sinister in ways not recognized by common law.

Thus, in nearly all the States, the subsequent marriage of the parents legitimates their issue, born prior to marriage, if acknowledged by the father, thus cancelling all distinction between such children and those begotten and born in lawful wedlock. Again, in some States, the issue of marriages which are null in law are in every respect legitimate, and inherit and transmit by descent as if born in lawful wedlock.

Apart from such statutes of legitimation, there are other provisions giving partial relief from common-law hardships. Thus in many States, even where there is no subsequent mar-

¹ *Reinders v. Koppelman*, 68 Mo. 482. In *Hockaday v. Lynn*, 200 Mo. 546, it is held that the adopted child does not inherit through the adopting parent.

² *Davis v. Krug*, 95 Ind. 1.

riage, the acknowledgment of paternity by the father (usually required to be in writing) legitimizes the offspring of the illegitimate union, so far as the right of the child to inherit from the father is concerned, and in many States puts the child on the footing of legitimacy on the father's side, so that it can inherit from collateral sources. Every State, it is believed, provides that the illegitimate inherits from his mother; and with few exceptions, the statutes of the States legitimate him on the mother's side for all purposes of inheritance. Where such statutes exist, wiping out illegitimacy as between mother and offspring, together with statutes providing that the father's acknowledgment shall give the offspring the right to inherit from and through him as a child lawfully begotten, the father's acknowledgment, satisfying the statute, gives the bastard all rights of legitimate offspring, so far as inheritance is concerned.

Sundry modifications of these general principles embodied in statutes, must be sought for in the laws of the respective States.

§ 75. **Aliens as Heirs.** — This subject was included (§ 12, *ante*) in discussing the alien's power to make testamentary dispositions, and his rights under the wills of others. Reference is made thereto to obviate repetition here.

§ 76. **Ancestral Estates.** — Under the common law, which governed the descent of realty, special provision was made as to ancestral estates. An ancestral estate is an interest in realty which the intestate acquired by descent or by devise or gift from some relative. If we assume a case where the nearest heir of the intestate is on his mother's side, *e. g.*, his mother's sole brother's sole son, it is proper that, as a rule, the estate of the decedent, real and personal, should go to that cousin. But if the intestate had realty which came to him from his father by descent or devise, it might well be urged that a relative on the father's side had a superior equitable claim to this specific realty which came from the father.

This doctrine, backed by reasoning based on feudal law, was recognized at common law. The inheritance of ancestral real estates passed by common law to the lineal and collateral heirs of the blood of such ancestor to the exclusion of other heirs of the intestate. The common-law rule concerned itself only

with realty. There were no ancestral estates in personalty. In most States this doctrine of ancestral estates is not recognized; but still it is the law in many States, being one of the few instances whereby our law of descent feels the influence of the old English system.

The term "ancestor" used in these statutes is not understood to be applicable only to progenitors in its usual acceptance, but in its technical significance, one from whom an estate came directly — not mediately — to the intestate by gift, devise, or descent, so that in this sense the husband may be his wife's ancestor under the American statutes when such give the wife a place among the heirs.

It is also to be noted that the distinction between the devolution of ancestral and other estates, as recognized by American statutes, is not usually construed as diverting the descent of an ancestral inheritance from the nearest of kin, but only from those not of the ancestor's blood who are in the same degree of kinship with others who are of the ancestor's blood.

Another restriction generally put upon these statutes confines their application to estates descended from the immediate ancestor of the intestate.

The rights of the half blood as heirs and distributees of realty and personalty, at common law and under statutes, have been discussed *ante*, § 71. Whenever a State recognizes distinctions as to ancestral estates, whatever its legislation may be as to distinctions between half blood and whole blood in general inheritance, the result must be to exclude from the inheritance of ancestral estates the half blood which is not of the line from which the estate came.

An exception to the general rules of descent, cognate in its nature to the above, has also been made by statute in some States in respect to the devolution of property granted to an intestate in consideration of love and affection, though not by an "ancestor," which, in case of the death of such grantee without issue, is directed to revert to the grantor.

§ 77. **Disinheritance of Heir or Devisee who kills Ancestor.** — In connection with the provision of the civil law excluding from the succession an heir or devisee who takes or attempts the life of a person to whom he should succeed, there has been some

diversity of opinion. It was held by the New York Court of Appeals that the common law, in the absence of specific enactment, and in disregard of the Statute of Descents, excluded such criminal from any share in the property of the deceased.¹ But subsequent authority, though not universal, has generally repudiated this view. There seems to be no escape on principle from the conclusion that at common law and under the statutes and constitutions of the various States of the Union, courts are not warranted in disregarding the course of descent and distribution, or the conclusiveness of duly executed wills, to divert the succession from murderers of ancestors or descendants.²

§ 78. **What Law governs Descent and Distribution.** — It is to be borne in mind that the distribution of personal property of an intestate must be according to the law of the country or State of which he was a domiciled inhabitant at the time of his death, without regard to the place of either his birth, or death, or the situation of the property at the time; but that real estate descends according to the law of the place where it is situated. Nor can the descent be governed by a statute not in force on the day of the intestate's death; and so a vested remainder descends under the law in force at the time of the vesting of the estate in expectancy, not affected by the law governing descents at the termination of the intervening estate.

¹ *Riggs v. Palmer*, 115 N. Y. 506.

² See Woerner on Administration, § 64. In addition to authorities there cited see recent cases of *Gollnick's Estate* (Minn.), 128 Northwestern 492; *Kuhn v. Kuhn*, 125 Iowa 449. The New York view was, however, followed in *Perry v. Strawbridge*, 209 Mo. 621.

CHAPTER IX.

PROVISIONAL ALIMONY OF THE FAMILY.

§ 79. **Nature of Allowance to Family.** — It has already been noticed that the power of testamentary disposition is limited, in some respects, by the policy of the law, which places certain rights beyond the caprice of a testator. One of these is the right of the surviving members of his family to the necessary means of subsistence, raiment, and shelter during the period immediately succeeding his death, which the law enforces not only against any inconsistent testamentary disposition, but equally against creditors, heirs, and distributees, whose rights, like those of legatees, are controlled by and postponed to the provisions made for the surviving family in this respect.

These provisions, like the kindred subject of the homestead exemption laws, are of purely American origin. They owe their existence to a humane and benevolent consideration of the distress and helplessness of widows and orphans newly bereft of their protector and supporter, and to a wise public policy, recognizing the true relation of the State to the Family as its organic, constituent element.

The common law secures to the widow her dower, and to the widow and children their *pars rationabilis* (corresponding to dower and distribution under American statutes), but no provision whatever is therein found to meet the exigencies arising immediately upon the death of the head of a family, save, perhaps, the clause in *Magna Charta* securing to the widow the right to remain in her husband's capital mansion for forty days after his death, within which time her dower was to be assigned. These rights are secured to the widow to an equal extent in all the States, aside from the subject now under consideration, and in addition to the exemption from execution of certain property necessary to the family during the lifetime of the husband, and which are in many instances continued in favor of the widow or minor children upon his death.

These provisions for the protection of the family constitute no gift to the widow to repair any seeming injustice in the Statute of Distribution or the will of her husband, but are intended to furnish to her and her minor children the means of temporary maintenance out of the estate of the deceased husband until their interest therein can be set out to them.

These allowances do not come to the widow or family by inheritance through the deceased's estate, but from the law and through the order of court. Neither do they form part of the widow's distributive share as next of kin, unless so expressed by the statute.

§ 80. **The Extent and Mode of Allowance.** — Some of the States mention specific articles thus set apart for the family, in which provisions play a prominent part, frequently providing that in absence of the specified things their value may be taken from the estate. In others the amount is fixed without mention of special articles. In still others the quantum of allowance is not fixed by statute, but left to the discretion of the Probate Court, sometimes with provision for Commissioners who report to the court.

§ 81. **Rules governing the Amount of the Allowance.** — When the amount is not fixed by statute, in exercising the discretion vested in them, Probate Courts or the Commissioners appointed by them to designate and set apart the property and money allowed for the provisional maintenance of the family are not to proceed in an arbitrary or capricious manner, but must exercise a sound judicial discretion.

In determining the amount necessary for such purpose, regard may be had to the state of the health, age, and habits of the widow, the number and age of the children immediately dependent upon her, as well as the value of the estate and of her dower and distributive share therein. It may also be considered whether or not she is accustomed to hard labor, and thus enabled to support herself, or whether by reason of ill health or other circumstances she is unable to do so. A smaller amount will be proper in the former case than that which may be necessary in the latter. When the statute fixes the time for the duration of which the allowance is to be made, it must, of course, be sufficient to secure the reasonable comfort of the

family during the whole of such period, if used with ordinary prudence and economy. If the estate is large, apparently solvent, and the allowance merely an anticipation of the widow's distributive share, a more liberal allowance will be justified than where it is small or insolvent; and what would be a reasonable allowance for one accustomed to privation and labor might be very unreasonable for one raised in affluence.

§ 82. To what Extent Liberality should govern the Court. — The tendency of courts has generally been to give full effect and realization to the humane and enlightened policy which dictated these enactments, by construing their provisions in the same spirit of liberality and consideration. Not so as to make them a cloak to cover up a substantial invasion of the rights of creditors, but so as to resolve all reasonably doubtful questions in favor of the widow and children. Cases illustrative of the way in which courts exercise their discretion in fixing the amount of the allowance, and further discussion as to the tendencies of various States will be found in Woerner on Administration, § 81.

§ 83. The Allowance with Respect to Solvency or Insolvency of the Estate. — The right of the widow and children is paramount to that of creditors, and hence does not depend upon the solvency or insolvency of the estate. In many of the States provision is made by statute that where the estate does not exceed in value a certain specified amount, or the amount to which the widow or children are entitled absolutely, no administration shall be necessary, but all the property of the estate is to be assigned and turned over to the widow, or if no widow, to the minor children. But, as we have seen, insolvency should affect the exercise of judicial discretion.

§ 84. Separate Property of the Widow affecting the Allowance. — In some States the statute makes the existence of separate property in the widow an element for consideration in fixing the allowance, going so far in some States (*e. g.*, Texas) as to refuse all allowance if she has independent means. In Massachusetts, where the statute contains no direction on the point, thus leaving it to judicial discretion, the court refused all allowance to a woman who had sufficient separate property. But in most other States, and particularly where the articles

of property allowed are enumerated by statute, the widow and children are entitled to this allowance irrespective of any separate property she or they may have.

§ 85. **The Will as barring the Allowance.** — It is held in a few States that where there is a will making provision for the widow she is not entitled to the allowance unless she renounces the provisions of the will. But where the testamentary provision is not expressly or clearly intended to be in lieu of the statutory allowance, the requirement to renounce seems to ignore and defeat the very object and intent of the law, which is “merely to furnish her with a temporary allowance, by which she can support herself and dependent children until her interest in the estate can be set out to her,” and the more rational view seems to be that she is entitled to the allowance in addition to the provision made in the will, and that the husband cannot deprive his widow of the allowance provided for by the statute by any provision in his will. In one or two States the courts hold that she is entitled both to her statutory allowance and a provision in the will expressed to be given in lieu of such allowance, but generally where the provision in the will is clearly inconsistent with taking the statutory allowance the widow is put to an election as to which she will accept.

§ 86. **How affected by Marriage Settlements.** — When a marriage settlement is set up as a bar to a claim for the widow's allowance, the court construes the agreement strictly in favor of the widow. Thus an ante-nuptial settlement whereby the wife released all her rights in the estate “whether of dower, or distributive share, or otherwise” was held not to bar the statutory allowance.¹ But this decision is said to go further than the authorities generally warrant.² A more cogent reason that might be urged would seem to be that these laws rest upon a sound public policy, and that contracts running contrary thereto are for that reason and to that extent void. It is the policy of the law to preserve, as far as possible, the integrity and continuity of the family, and to protect it even against the thoughtlessness and improvidence of men and women. It is to be observed, however, that this right on the part of a widow to repu-

¹ Pulling v. Durfee, 85 Mich. 34.

² See Dellner v. Dellner, 141 Wis. 255, s. c. 124 N. W. 278.

diate an executory marriage contract no longer exists after she has deliberately accepted its terms; in other words, she cannot both execute and repudiate the contract, and the children are bound by her election. And, when not affecting minor children, it is generally held that a fair ante-nuptial agreement relinquishing the right to the allowance is not void, but will be enforced against the widow in the proper tribunal, and her contract held to be binding upon her. And also that articles of separation between husband and wife, based on a valuable consideration, wherein these provisions for the widow are relinquished, debar her from these statutory allowances.

§ 87. **How affected by Liens or Preferred Debts of the Decedent.** — Since the property allowed to the widow is not, in most States, treated as assets of the estate, it would seem to follow that the widow is entitled to it in preference to general creditors of any kind, whether for ordinary debts of the decedent, expenses of the last sickness, or even funeral expenses, and charges for settling the estate. On the other hand as a general rule the widow takes the property she claims subject to specific liens existing against her husband's title; otherwise she would have a better title than had the deceased husband through whom she takes. But in several States, notably Pennsylvania, the widow takes her allowance freed from certain liens which rested on it at her husband's death. The rulings, dependent on construction of statutes, vary largely.

§ 88. **When the Allowance takes Effect.** — The right of the widow to the money or property allowed for her and her family's temporary support is held in some States to be absolute, and to vest at once upon the husband's death. In others, it is held to vest upon confirmation or allowance by the probate court, or selection by the widow or guardian of minor children, and may then be recovered by her personal representative; and if the allowance to her is of such articles as she may have chosen, and if they are sold, although by her consent, but without a waiver of her claim to an allowance, she is entitled to the avails thereof. The absolute title of the widow, and in the absence of a widow, of the minor children, to the property allowed them for temporary support, follows of necessity in all of those States in which it is assigned to the widow or children without further

administration, when it appears that the total value of the estate does not exceed the amount so allowed; for the abandonment of further administration rests solely upon the ground that there is no property to administer, because what property the decedent may have left is the property of the widow or children, in which no other person has any interest. Where it is ruled that her title accrues only on allowance by the court or a formal setting apart of the property (which, however, is not the rule in most States), it would seem that her death prior to such event would abate the whole claim; and it has been so held in several States. Whether the widow's remarriage terminates her interest in the allowance, has been differently decided under varying statutes. The decision would seem to turn largely on the nature of her right in the allowance as above set forth.

§ 89. What constitutes a Family. — The terms used to designate the recipients of this bounty are commonly "widow," "widow and children," or "widow and her family." The number of persons constituting a family is sometimes an important circumstance in ascertaining the proper amount to be allowed for their maintenance and support, and it is therefore necessary that the legal meaning of the term be understood. It may be difficult to define the word accurately and scientifically, so as to include all the specific significations to which it is applied; but its popular meaning, and the sense in which it is used in the statutes under consideration, seem to be plain. Illustrations can be gathered from the cases cited in § 86 of Woerner on Administration.

§ 90. Allowance to Widow Alone. — Although the statute provide this allowance for "the widow and children constituting the family of the deceased," the widow alone may take, if there are no children. Where the allowance is to the widow and children, it must be paid directly to the widow; the children are entitled to no part of it. A woman who has been divorced from her husband is self-evidently not entitled to this allowance, nor indeed to any share in the estate of her former husband; having ceased to be his wife during his lifetime, she cannot be considered his widow after his death. Whether the wife who has deserted her husband without cause is entitled

to the allowance on his death is decided both ways in different States depending on the statutes and their construction.¹

§ 91. **Allowance to the Children Alone.** — As the widow alone, if there are no children, may claim the allowance under a statute securing it to the widow and children, so the children alone are entitled if there is no widow. Their right does not depend upon the assertion of it by the mother. And where the children of a former wife live separate from the widow, under the control of their guardian, it is the duty of the probate court to make such an apportionment between the widow and the children as will, under the circumstances, and taking into account the sum necessary for the support of each, be just and equitable.

§ 92. **Out of what Property to be allowed.** — Since the administration of estates is ordinarily confined to the personal property left by a decedent, and the executor or administrator is usually his *personal* representative, his real estate passing at once to the heirs, devisees, or dowress, the allowance for the temporary support of the widow and family is not, in most States, made a charge upon the real estate, but granted, generally, out of the personal property left by the decedent only. Hence money representing the proceeds of real estate cannot be allowed to the widow under this claim, although she be entitled to all the personalty of the estate, leaving the expenses of administration to be deducted out of the proceeds of the sale of real estate. Where the statute enumerates the specific property to which the widow is entitled, the allowance must be out of such articles actually on hand at the time of the husband's death, and no property or money not on hand can be assigned to her. But if the articles so enumerated, or, where she has the right to select, the articles so selected, are sold by the executor or administrator, she is entitled to the proceeds of the sale. Where the statute fails to designate the specific nature of the allowance, it may be allotted in money. It is self-evident that there can be no allowance to the widow or children out of property to which the decedent had no title at the time of his death. The allowance in most States cannot be made out of partnership property, as such, of a firm of which deceased was a member. But it may be set apart out of property

¹ See Woerner on Administration, § 89.

in which deceased had an undivided interest to the extent of such interest. And the allowance may be made out of proceeds of life insurance whenever such is assets, and likewise out of Government gratuities or appropriations in the nature of pensions for past services to the Government given to the "legal representatives" of the deceased and exempted from his debts. When property is set apart to the widow as her allowance, she receives the same title her deceased husband had, and the court of probate has no jurisdiction to determine the title as between her and third parties claiming title paramount to that of the decedent. The widow's right extends only to property possessed by deceased at the time of his death.

§ 93. **Time and Procedure to obtain the Allowance.** — Where the widow herself administers the estate, she can easily avail herself of the benefit of the provisions made in her favor by simply taking credit in her settlement with the court for the amount allowed her by order of court, the award of appraisers or commissioners, or the amount fixed by the statute. In such case, also, she will rarely suffer in consequence of neglect or tardiness in taking the necessary steps to secure her allowance. But in many cases it is impracticable for her to administer, either from age, infirmity, ignorance, or inability to give bond, and then, from the exigency of her situation and the very nature of the relief secured to her by the statutes under consideration, a speedy and summary remedy to obtain her rights is indispensable, and is in most States provided by enabling the widow to obtain her allowance by simple motion or petition, if the court or commissioners should omit to grant it without such motion.

Where the entire estate is not greater than allowed to a widow without administration, she may defend her title in equity, although the probate court has made no order in the matter; and even so where there has been no administration, since the equitable title is in her, and where the amount is less than the widow's allowance, she can maintain an action against a mere intruder, though there has been no administration. Where an application by the widow or minor children is necessary at all, it should be made as early as possible, since, as a general rule, it cannot be entertained when the time for which the temporary

allowance was intended has expired. In Alabama and Texas it is the imperative duty of the judge of probate to make the allowance, upon or without the motion of the widow, and the widow and children do not forfeit or lose their right to the same from their neglect to apply or the failure of the probate judge to make it in time. In Missouri by the terms of the statute, the allowance may be claimed at any time before it is paid out in discharge of debts, or distributed; but where the personal assets are exhausted before the claim is made, it cannot be allowed out of the proceeds of real estate sold for debts.

§ 94. **Additional Allowance.** — Whether a second claim for the widow's allowance can be entertained or granted, must obviously depend upon the nature of the original allowance. If this was intended for immediate relief only, and was granted before there was an opportunity of determining the extent of the allowance to which the situation of the widow and her family, the value of the property left by the deceased, the amount of debts, and other circumstances entitled her, it is apparent that such allowance cannot be looked upon as an adjudication upon the matter, and that, in the absence of a restraining statute, the probate court has power to make a new allowance upon proper proof of the circumstances justifying it. The petition for further allowance must show that the former provision is insufficient or exhausted.

§ 95. **What Law governs.** — The widow's right to an allowance including its character and amount is generally determined by the law in force at the time of the husband's death, but that, as in similar collisions between the rights of creditors and others, the rights of creditors cannot be impaired by subsequent legislation; consequently, the surviving widow's claim is determined, as to the debts of the husband, by the law in force at the time they were contracted, and cannot be enlarged by later enactments.

§ 96. **Scope of the Subject.** — The reader is reminded that in treating a subject such as that covered in this chapter which is of purely statutory origin, with almost countless diversities in detail under the laws and decisions of the different States, this treatise attempts nothing beyond giving the general trend

of legislation, noting points of importance on which the States take opposing views, and calling attention here and there to some interesting view peculiar to some State. For further detail the reader is referred to Woerner on Administration, from which this book is compiled.

CHAPTER X.

EXEMPTION OF THE HOMESTEAD.

§ 97. **Nature of the Homestead Right of the Surviving Family.**

— The policy which dictates provision for the support of the family immediately after the death of its natural provider and protector also requires the homestead to be secured to the surviving husband or widow and minor children. The obvious intent of homestead laws is no less to secure a home and shelter to the family, when bereft of its father or mother, beyond the reach of financial misfortune, which even the most prudent and sagacious cannot always avoid, than to protect citizens and their families from the miseries and dangers of destitution by protecting the wife and children against the neglect and improvidence of the father and husband. The homestead exemption would be divested of its most essential and characteristic feature, if, upon the death of the head of the family, it should be withdrawn from the widow and children; hence nearly all the statutes upon this subject provide for its continuance to the surviving constituents of the family. Homestead statutes provide for two situations. First, during the life of the head of the family, they exempt the homestead from creditors' claims; secondly, they give rights in the homestead after the death of the head of the family to its surviving members. It is the right of surviving members of the family that falls within the scope of this treatise.

The statutes of the States present two theories, often with inconsistent exceptions or blending of the two ideas, as to the nature of the interest of the survivors in the homestead.

On one theory the homestead exemption descending to widows and minors is not strictly an estate, or property, given as such to those entitled to it under the homestead law; but rather a privilege, extended to the beneficiaries thereof, protecting them in the enjoyment of property to which it applies against the claims of creditors or the rights of adult heirs; as creditors could

not enforce their demands out of the property constituting the homestead during the lifetime of the debtor, so no creditor, either of the decedent, or of any member of the surviving family, nor adult heirs, can enforce them after his death, so long as there is a family, or, in most States, a widow.

But on another theory adopted in some of the States, the homestead is not a mere exemption in favor of the widow, but passes to her an absolute estate, in derogation of the rights not only of creditors, but also of the heirs.

It is believed that this difference of view as to the nature of homestead is at the bottom of much divergence in the decisions on many points; such as the widow's right to abandon the homestead, or to sell it.

§ 98. **What Tenement constitutes the Homestead.** — The homestead thus transmitted to the surviving family of one dying is the homestead in fact, — the dwelling-place occupied by the family, with all the land and its appurtenances to the extent allowed by the statute, including the crops growing thereon at the time of the death. Subsequent appreciation or depreciation in the value of the property does not affect the tenure. Unless so expressed by statute, the survivors do not acquire, in consequence of such death, the right to select a homestead out of the body of the decedent's estate; and where the statute confers such right, the homestead must be set out and determined by the proper tribunals in accordance with the statutory provisions.

The widow and children take the same estate which the deceased husband or father possessed in the homestead, and no greater; if the estate is less than a fee, it ceases with the expiration of the term. Possession alone, without ownership in the land as a basis for the homestead claim, cannot be set up to defeat a recovery in ejectment under a paramount legal title; nor can the widow or minor children claim exception from the bar of limitation. Nor is the mere intention of the decedent to occupy a particular tract of land as a homestead, who died before such intention was carried into effect, sufficient to entitle the widow to the exemption of such tract as a homestead.¹

¹ For authorities on these propositions see Woerner on Administration, § 95.

§ 99. **Homestead Rights of the Widow.**—The rights of the widow to the property constituting her homestead are to be distinguished according to the nature of her relation to the same. If she be the owner of the property in fee, which she may occupy as the head of a family or otherwise, the law makes no distinction between her and homestead tenants in general, either as to the liability of such property for her own debts, or as to any incidents affecting her right to the same. But if the property passed to her from her deceased husband, not by devise or the law of descent, or as dower, but by the statute, so as to be enjoyed by her as a homestead, she holds such property exempt from the claims of creditors, her late husband's as well as her own, and mostly, also, against her husband's heirs. This, as has been shown, is the law in most States, giving her the enjoyment of the homestead, whether there be a child or children or not, either for the period of her natural life, or as long as she may remain unmarried, subject to the cotenancy of minor children. If there be no children at all, or no minor children, she takes the homestead as the remaining constituent of the family for whose protection the law is intended. In some States, however, this view is not deemed warranted by the language of the constitution or statute, on the ground that the homestead is a mere exemption against creditors, and cannot avail the widow against the heirs.

Where the widow's right to a homestead is made dependent upon the existence of a family, not defined in the statute creating the right, it is difficult sometimes to determine what constitutes a family. This subject is treated in connection with the provisional alimony for the family, and the reasons and authorities given there as determining the question apply with equal force to the subject of homestead.¹

For the reasons mentioned in connection with the provisional alimony of the family and in treating of the widow's right to dower, non-resident widows or minor children can have no right to a homestead under the exemption laws of the husband's or father's domicile at the time of his death. But since the husband's domicile draws to it the domicile of his wife, the involuntary absence from the State, or an absence not amounting

¹ See Woerner on Administration, § 88.

to abandonment or desertion of the husband would not, it seems, militate against her homestead rights; hence the mere fact of her never having been in the State does not debar her.

§ 100. **The Homestead as affected by the Widow's Dower.** — The purpose of the homestead acts is to secure a home *for the family*, including the widow within the scope of the beneficial intent only in so far as she may represent, or constitute, a member of the family. It is therefore a question whether the widow is intended to enjoy the benefit of her dower in the land of her deceased husband and her homestead cumulatively, or whether her claim to or acceptance of the one excludes her interest in the other. In most of the States this question is determined by the statutes themselves; and as these differ from each other, so a different conclusion is reached in the different States by the courts called upon either to construe doubtful phraseology of statutes, or to announce the principle governing where the statutes are silent.

§ 101. **The Widow's Right to sell the Homestead.** — Whether the widow can assign, convey, or sell her right to the homestead is a matter of some doubt, and the authorities are not harmonious. The language of the statute securing the right to the widow must be decisive, of course, and in many instances leaves no doubt in this respect; but it is not always clear enough to enable courts to reach a conclusion without recourse to construction. If the right to the homestead consists of the *mere exemption* from compulsory sale for debts, or even of a present right to possession as against heirs, it seems to result that the right ceases as soon as the owner thereof abandons the homestead, or surrenders possession to a grantee, and then the owner of the fee is entitled to possession. In such case a sale would pass no right whatever to the vendee, because the great object of the law, to secure a fixed home for the family, would be defeated by permitting the alienation of that home. Where the statute creates a new estate, which is given to the widow, in derogation of the rights not only of creditors, but also of heirs and devisees, there the enjoyment of such estate includes the power to transfer, lease, or sell it, and hence the widow's vendee or assignee takes the same title which she had.

§ 102. **Abandonment or Divorce affecting Homestead.** — Where

the statute makes the homestead an *estate* in the widow, it does not seem that it can be lost by failure to occupy it; but where the character of *exemption* predominates, the abandonment of a homestead by the widow or minor children has been held to destroy their homestead right in the premises; but however proper the application of such principle may be during the lifetime of the debtor, it is necessary to observe that the temporary absence of his widow does not constitute abandonment, either by her or the minor children, and that the tendency of courts is to relax the requirement of literal occupation by the widow, and to dispense with it altogether in the case of orphan minors.

It seems hardly necessary to mention, that neither a woman not lawfully married, nor a wife who prior to her husband's death has been notoriously unfaithful to him and is not a member of his family at the time of his death, or has abandoned him, nor one who has been divorced, can claim a homestead against the husband's real estate. A wife will not lose her homestead rights if she leaves her home by reason of the husband's cruelty; and in an action by her to recover lands claimed as homestead, if the defendant allege that she of her own wrong had deserted her husband, she may show that she left him because of his cruelty.

§ 103. **Homestead Rights of Minor Children.** — Children during the period of their legal infancy are the peculiar objects of the protection intended by the homestead laws; while in some of the States a widow is denied a homestead against the claims of heirs, minor children are entitled to such in all the States in which homestead laws exist, whether the father, the mother, or both parents have died. Thus it has been held that, upon the death of a man who had acquired a plantation and lived upon it, while his wife and children lived in another State, the homestead right existed in his children, although the wife died, and neither she nor the children had ever lived upon the plantation.¹

The distinction between the personal rights of the widow as such, or considered as a *constituent member* of the family, and the authority vested in her as the *representative*, or *head*, of a family, must be kept in sight in ascertaining whether her acts

¹ Johnson v. Turner, 29 Ark. 280.

in respect of the homestead are binding upon the minor children or not. Where the homestead rights are given to the children, or the widow and children, or to the family, it is obvious that no release, waiver, sale, or abandonment by the widow can deprive the children of their rights, if there be a practical necessity or occasion to assert them. Although the widow's interest in the homestead may cease upon her marriage, yet the rights of her minor children are not thereby affected.

§ 104. Homestead Rights of Widow and Children as affected by Encumbrances. — The statutes of most States provide that the homestead exemption shall not apply against debts created in the purchase or erection of the homestead, or against mortgagees under mortgages duly entered into by both husband and wife. That the homestead property is liable for the purchase-money for which the owner became indebted in acquiring it is not only just, but inevitable, since upon any other condition its acquisition would become impossible in all or most cases in which the purchaser has not sufficient means to pay the full price at once. It is equally apparent that such homestead descends to the surviving family subject to the vendor's lien, and to the claims of those who furnished money, materials, or labor for its erection. And, generally, the homestead descends charged with such debts of the deceased owner as could have been enforced against it in his lifetime, but discharged of any which could not have been so enforced.

If the lands are encumbered, or cannot be partitioned without material injury, they may be sold, and the homestead set apart out of the proceeds.

§ 105. Homestead Rights as affected by Inconsistent Disposition of the Estate by the Deceased Owner. — The right of the surviving widow and minor children to the homestead premises is obviously paramount to that of the deceased husband or father to dispose of them; else it would be in his power to defeat the intent and purpose of these laws. Hence a testamentary disposition of the homestead estate inconsistent with the rights of the surviving members of the family is void. The homestead estate bears great resemblance to dower in this respect, and many principles governing the latter are applied by analogy to the former. But the widow may be compelled to

elect between a testamentary provision and her right to the homestead, where the two are clearly inconsistent.

It may be stated, also, that in most States the alienation of homesteads without the consent of both husband and wife is held unavailing to prevent them from claiming the protection of the homestead law.

§ 106. **Homestead Rights as affected by Administration.** — It follows, from the nature of homestead rights, that the homestead can in no view constitute assets in the hands of the administrator, since it vests in the widow and children free from the husband's debts. It does not pass to the beneficiaries by the laws of inheritance or devise and hence is not derived from the deceased so as to make it subject to inheritance taxes. Its use is reserved to the family during the whole period of administration; the authority of the probate court over it is limited to segregating it from that part of the decedent's estate which is subject to administration; when that is done, its jurisdiction ceases. Hence a sale of the homestead by the administrator will not divest the rights of the widow and children, unless it is made to pay debts contracted before the homestead was acquired, or any privileged debts to which it may be subject; and in such case the burden of proof that the homestead was liable for such debts is upon the purchaser.

In most States when the right of homestead occupancy ceases by the death of the widow and the majority of the children, the estate passes to the heirs, or becomes subject to the claims of creditors, as though no intervening homestead right had existed. If the intervention of the homestead has prevented a creditor from recovering his debt, the usual rule against delay in subjecting real estate to the payment of debts does not apply. In some of the States the land may at once be sold, if necessary to pay the debts, subject to the right of occupation by the widow and children; but in others such sales are strongly objected to and denied, because they tend to sacrifice the interests of all parties concerned, since "but few purchasers not venturing on a mere speculation in which they supposed they had much to gain and little to lose, would buy property subject to such an encumbrance." ¹

¹ *Rottenberry v. Pipes*, 53 Ala. 447.

§ 107. **Procedure in Probate Court in setting out the Homestead.** — Where the homestead right of the widow and minor children is secured to them by the statute, it vests at once upon the death of the owner, without preliminary formalities in any court. But when, for any reason, it becomes necessary to set apart the homestead from the remaining real estate of the decedent, so as to designate the particular parcel or tract to which the homestead right attaches, the proceeding may generally be had in the probate court having control of the administration of the estate.

No particular formality is required to give jurisdiction to the probate court, except an inventory of the real estate, and a description of the tract or parcel of land constituting the homestead, and proof of the insolvency of the estate where the homestead right depends on such fact; and there should be a petition praying for the order. The application may be made at any time before a sale by the administrator, and even after a sale the allowance may be made, if by her acts the widow has not waived her right, or estopped herself. The proceeding in the probate court in setting apart a homestead does not affect the title by which the property is held, but is simply to withdraw, for the benefit of widow and children, certain assets exempt by law from the claim of creditors. Where the question of the homestead right depends upon the title to the property, and objection is made in the probate court, it must be tried in another forum; and any person having an adverse interest may appear to defeat the application.

§ 108. **The Rights and Burdens connected with Enjoyment of the Homestead.** — The owner of a homestead interest in lands has the right to protect the same against wrong or injury by others to the full extent of his ownership, and is entitled to be compensated in damages for any violation of such right.

Together with the rights of ownership, the law also casts upon the homestead tenant the burden of paying the taxes upon the property and the expenses of keeping it in repair. Hence the administrator will not be allowed credit in his administration account for disbursements to pay taxes and repairs of the homestead property occupied by the widow, although it had not been formally selected by or assigned to her.

§ 109. **What Law controls.** — The right transmitted to the surviving members of the family is determined by the law as existing at the time of the death of the person from whom it descends; no subsequent change of the law will affect their rights. But as to creditors, it must be remembered that their rights cannot be impaired after the debt is contracted; so that a homestead or other exemption law is in derogation of the Constitution of the United States, in so far as it attempts to withdraw from the reach of the creditor property which was within his reach before.¹

¹ *Gunn v. Barry*, 15 Wall. 610, 621.

CHAPTER XI.

DOWER.

§ 110. **Dower in Realty.** — Dower and curtesy in real estate can properly be claimed as falling within the scope of a treatise dealing with the devolution of a decedent's property; but these subjects also form important chapters in every work on real estate. Since in a students' course Realty normally precedes Administration, and as a treatment here of curtesy and dower in realty, through condensation, necessary in justice to other topics, would be only recapitulation, it seems best to omit these subjects, and to call attention in this connection only to two matters that seem especially pertinent to our general topic.¹

§ 111. **Dower in Personalty.** — Dower is ordinarily understood to be applicable to real property only; in some of the States, however, the statute provides for dower in personal property, referring in some instances to the property assigned for the temporary support of the family, in analogy with the ancient custom of supporting the widow out of the estate during the period of quarantine, and in others to the share allowed her by law out of the personalty.

These provisions are different from those for homestead and also from those which give her a regular place somewhere among the kin to whom the estate of the decedent goes. The statutes here considered give the widow an interest in the estate, real and personal, of the deceased, varying with the number of children or the absence of children, and varying also as to liability for debts of the deceased. Under such laws the widow takes her share in the estate, in case of intestacy, with the distributees. If there is a will, containing provisions for the widow in lieu of the statutory share of the estate, a case for election

¹ The reader is referred to Chapter XI of Woerner on Administration for discussion of Dower and Curtesy.

is presented. To apply the name "dower" to such a right does not seem apposite, and unfortunate by tending to confusion in the meaning of a well-defined term. The subject is analogous to, and has been mentioned in connection with, that of provisional alimony of the family. The statutes vary greatly.

§ 112. **Election between Dower and Devise.** — It is the policy of the law to place the widow's dower beyond the reach of the husband, who can, at common law as well as under the statutes of most States, neither sell, convey, nor otherwise dispose of his real estate so as to deprive his widow of dower therein without her free consent. A devise to such effect is *a fortiori* void, unless she chooses to abide by it. If, therefore, the husband devise lands to his wife, she will, under the English doctrine as held before the change made by statute in this respect, take them as a voluntary gift in addition to what the law secures to her as dower, unless it appear plainly, either by express words or by manifest implication, that the devise was intended to exclude dower. The statute referred to, enacted long after the establishment of the American government, is of no force *proprio vigore* in any of the States of the Union; and the doctrine holding devises to be given in addition to dower, if not otherwise directed by the testator, is recognized in all of them where not abrogated or modified by their own statutes.

This rule, however, was changed in England by the statute already mentioned, which has been incorporated, with some modifications, into the codes of many States. According to the English statute, the devise to the wife of any land, or any estate or interest therein, was construed in lieu of dower, unless a contrary intention appeared from the will, thus reversing the presumption arising from an unexplained devise for the benefit of the widow. In some of the States the language of the statute is more sweeping than that of the English act, and seems to be in lieu of dower in every case where the widow takes anything under the will. Generally, however, the condition allowing her to enjoy both the devise and dower is, that such shall clearly appear to be the testator's intention, either expressed or necessarily implied.

If the devise or provision in the will be inconsistent with the enjoyment of the right of dower, or expressly stated to be in

lieu of dower, or not expressed to be in addition to dower in those States which do not allow dower and devise cumulatively without express direction or manifest intention of the testator, the widow, though she cannot enjoy both her dower right and the provision made for her by will, may elect to take either the one or the other.

The right of election is guaranteed to the widow in the fullest manner, and for the purpose of enabling her to secure her own best interest and greatest advantage. To this end she is entitled, not only to have sufficient time to make her choice, but also to full information of the condition of the estate. No act of election will be binding on the widow, unless done under a full knowledge of all the circumstances, and of her rights, and with the intention of electing; and if she exercise the right prematurely she will not be estopped from maintaining an action, within the time allowed by law for such election, to cancel the election so made. But if she make her election under a full knowledge of the facts, she will be bound thereby, in the absence of fraud or unfair advantage, even though she did not understand her legal rights. The statutes of the several States contain minute provisions as to the time and manner in which the election is to be made; and as the right is a statutory one, the widow is held to a strict compliance therewith. If she permit the time to expire without making her election, she will, in most States, be held to a waiver of her dower.

In some States an election may be made between dower and a statutory share. For instance, in Missouri, the widow, if she have a child living by her husband, may also elect to take in lieu of dower a child's share, or, in case the husband dies childless, one-half, subject to debts, of the real estate owned by him at his death; and in making such election in lieu of dower, the same rules apply, and the election must be made strictly in the manner and within the time prescribed by law, or she will take common-law dower. A corresponding right to take against the wife's will is, in many States, given the husband.

The right to elect is a strictly personal one, which in the absence of statutory authority can be exercised by no one for the widow, although she die before the time given to make the

election have expired, or be insane; but provision is made by statute, in some instances, authorizing the widow to elect by attorney or guardian.

Acts *in pais* may determine an election, as well as matter of record: thus assignment of dower by a court of competent jurisdiction, the filing of a petition for dower within the time allowed to make the election, renouncing by deed the provision made in the will and claiming dower, contracting to relinquish her right, for a valuable consideration paid her, taking possession of property under a will and exercising unequivocal acts of ownership over it for a long time, and giving written notice to the executors of her intention, have all been held to constitute an election binding upon the widow.¹

The acceptance by the widow of the testamentary provision made for her, in lieu of her right of dower in the testator's estate, gives her an interest therein superior to that of a legatee: having relinquished her dower, which is paramount to the rights of creditors as well as of legatees or devisees, she thereby became a purchaser of the interest represented by the devise or legacy to her. She takes, not by the bounty of the testator, but in virtue of what is tantamount to a contract with him, a point of importance in determining the priority in payment of legacies when the assets are insufficient for all, as we shall hereafter see in connection with the classification of legacies.

It may be remarked in this connection, that the renunciation of dower enures to the estate, and has been held to go to the heir or distributee in default of testamentary disposition, so that the widow herself is not precluded from taking or sharing therein as heiress or distributee, although she could not take as dowress; but it seems that the declaration by the testator that the legacy is to be in lieu of dower, if she accepts it, prevents her from taking anything else.

On the other hand, the rejection by the widow of the provisions made for her by will and her election to take under the law (either dower or a statutory share provided for in most States) generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is, that the devise or legacy which the widow rejects is to be ap-

¹ For the cases see Woerner on Administration, * 271.

plied in compensation of those whom her election disappoints. If the renounced share is insufficient to compensate the disappointed beneficiary, the other devisees or legatees, at least such as are in the same class with him so far as priority of payment is concerned, must contribute *pro rata* to make up the deficiency.

CHAPTER XII.

PARTNERSHIP ESTATES.

§ 113. **Results of Death of a Partner at Common Law.** — The death of any one member of a partnership dissolves the firm. The right of creditors of the firm on the one hand, and the respective rights between the surviving members of the firm and the representatives of the deceased member on the other hand, as they stand at Common Law, first require consideration.

The key to the situation lies in the fact that while the partnership lasts, apart from statutory changes, the partners' title to the partnership property is joint, not joint and several, and the partners' obligations to third persons, at law, are similarly joint. Upon the death of any partner the title to firm assets is therefore vested in the survivors; the representatives of the deceased partner have no legal title in any of the assets of the firm which has been dissolved by the death of such member. Furthermore, as a matter of law, as distinguished from equity, the obligations of the firm exist only as against the surviving partners. Creditors of the firm can proceed, so far as strict law is concerned, only against the surviving partners.

§ 114. **Results of Death of a Partner in Equity.** — The foregoing gives the relation between the firm dissolved by death of one of its members and third parties. But within the limits of the firm thus dissolved the relation is different. There the surviving members, sole owners of assets and sole debtors as far as third persons are concerned, are trustees as regards the interest of the deceased partner. It is the duty of the survivors toward the representatives of the deceased, to collect the assets, discharge the debts, and account to the representative of the deceased for the interest of the deceased in the firm. At law the representative of the deceased partner has no right to control the actions of the surviving partners in the realization on assets of the late firm, or in the discharge of its obligations.

The representatives of the deceased have merely a right to an accounting from the surviving members. It will thus be seen that the survivors virtually administer on the firm. But, apart from statutes, they are not administrators, since they are appointed by no court, and can be reached by no court with specific jurisdiction in probate matters.

The modifications of this general legal view are probably nowhere a connected system, and mostly a patchwork of changes by decisions at law, by intervention of Courts of Equity, and by statutory enactments. It seems best to take up the concrete questions *seriatim*.

§ 115. **The Right of Surviving Partners to prefer Creditors.** — As will hereafter more fully appear, the executor or administrator of an individual estate at common law has the right to prefer creditors within a class as against all others of that class; not however against creditors of a superior class. At common law surviving partners have the same right to pay off a firm creditor in full, though to the detriment of other firm creditors of the same class. Where the statutes have not changed the law, the rule seems to be recognized in America, though this is denied in some of the States.

In Kansas¹ it is held that the statute prohibits a general assignment for the benefit of creditors by a surviving partner; and in Missouri² it was likewise so held after a full discussion of the authorities, three judges dissenting.

§ 116. **Surviving Partners continuing the Business.** — If surviving partners continue the trade or business of the partnership with the partnership stock, it is at their own risk, and they will be liable, at the option of the representatives of the deceased partner, to account for the profits made thereby, or to be charged with interest upon the deceased partner's share of the surplus, besides bearing all the losses; but, except under particular circumstances, the party having the choice cannot elect the interest for one period and the profits for another, but must elect to take one or the other for the whole period. And if the profits are claimed, bad debts must also be deducted; and if the continuance prove beneficial to the parties, the surviving partner

¹ Shattuck v. Chandler, 40 Kan. 516, 520.

² State v. Withrow, 141 Mo. 69, 81.

should receive a reasonable allowance for his skill and industry in conducting the business, although usually a surviving partner is not allowed compensation for winding up the partnership business, unless the services rendered are extraordinary and perplexing in their nature, so as to justify an exception to the general rule, or stipulated in the articles of copartnership. The whole transaction should be adopted or repudiated. If, however, the business is carried on by the survivors with the assent of the executor or administrator of the deceased partner, the survivors are liable for the profits only, and if a loss transpires, they are not liable for either unless there was negligence or carelessness in the management of the business. Nor do the executors, who allow the share of the capital of their testator to remain in and be employed in the business of the partnership after his death, according to the testator's instruction in the will or the partnership agreement, thereby become liable as partners, or incur any responsibility. And since the liability to account for profits after dissolution rests upon the exposure of the stock of the outgoing partner to the risks of the new business, there is no liability to account when such partner has withdrawn as much or more than as much of the partnership funds as he is entitled to. If the business is carried on with the consent of some of those who represent the interest of the deceased partner, and against the consent of others, the earnings are to be divided according to the capital to which each was entitled, after deducting such share of them as is attributable to the skill and services of the surviving partner, if there are no circumstances rendering such a rule unjust or inapplicable.¹

No notice of the dissolution of the firm by the death of one of its members is necessary to discharge the estate of the decedent from liability for any subsequent transaction, except, perhaps, where the surviving partners, or one of them, are executors of the deceased partner, and the business is continued under the original articles of copartnership.

§ 117. Continuing the Interest of Deceased Partner in Business.

—Agreements among living partners looking to a continuance of the business after a partner's death are, however, to be looked upon as bargains for the creation of a new partnership when

¹ See Woerner on Administration, § 125 and notes.

the old one ceases to exist, since the partner who has died cannot by possibility continue a member of the firm, and though his executors or children become members, yet it cannot be the same firm as that of which he was a member. In the absence of an agreement of all the partners, the executors of a deceased partner have no right to become partners with the survivors of the firm, nor in any manner to interfere with the partnership business, save to represent the deceased for all purposes of accounting; but a testator may by his will so direct the continuance of the partnership after his death that the whole estate shall be liable for the post-mortuary debts, or only to the amount of his actual interest in the partnership debts at his decease. It has been held in England, and in some instances in the United States, that a court of equity, or even probate, may authorize the administrator of a deceased partner to continue the partnership in behalf of an infant heir; but this seems a dangerous power, perilous alike to the administrator, who is personally liable for debts incurred in the prosecution of the business, and the beneficiaries of the estate, whose interests may be jeopardized by the vicissitudes of trade, although the administrator may exercise the utmost vigilance and caution. The extent of the liability of a deceased partner's estate for debts contracted after his death on behalf of the partnership will in all cases depend upon the terms of the agreement in virtue of which it is continued; and while it is clear that, on general principles, no limitation of the extent of his assets to be employed in the partnership business can affect the rights of creditors existing at the time of his death, it is equally clear that only the most unambiguous language, showing the positive intention of the testator to render his general assets liable for debts contracted after his death, can justify the extension of the liability of his estate beyond the actual fund employed in the partnership at the time of his death.

The continuation of the partnership after the testator's death, in pursuance of the directions in the will, has the effect of creating a new partnership, of which the survivors and executors of the deceased partner are the members; and creditors of this new firm have no claim upon the general assets of the testator, but only upon such assets as are directed by the will

to be therein employed. And in this new firm the executor pledges his own responsibility to the creditors, although he carries on the business not for his own benefit, but only for the benefit of children or legatees of the testator. Hence it must be optional with the executor, even where an apparent duty is imposed by the will, to refuse to connect himself with the business, and with still greater reason in the case of an administrator.

§ 118. **Rights of Partnership Creditors.**—As above shown, the legal remedy of firm creditors at common law is against the surviving partners. Their judgments can be realized out of firm assets, and also out of the personal assets of the surviving partners. At common law there is no remedy against the estate of the deceased partner.

But equity will give the firm creditor a remedy against the estate of the deceased partner in case of insolvency of the surviving partners. Whether the firm creditor can proceed against the deceased without having actual judgment against the survivors and a return of *nulla bona* thereon, is variously held. In the absence of a statute making the debt joint and several, it is but one phase of the larger question whether a creditor can enforce an equitable remedy before obtaining a judgment at law.

As above shown, the absence of a legal remedy against the estate of the deceased arises from the fact that the firm obligations at common law are joint, not joint and several. But the statutes of most States have made the firm obligations joint and several. Where this is the case, the firm creditor has a claim at law against the estate of the deceased partner.

But in such cases it must be remembered that whenever assets are administered on equitable principles (and this is generally true of probate administration), firm assets are primarily applicable to the payment of firm debts, and only the surplus, if any, after full discharge of firm debts, can be reached by creditors of individual partners. Conversely, the individual assets of a partner are primarily used for the payment of his personal debts; firm creditors can claim only after the personal creditors have been paid in full. So, in those States in which the partnership creditor can prove up directly against the estate of the

deceased partner, the general rule is that payments will be made on such claims only after the personal debts of the deceased are paid.

§ 119. Rights of Representatives of the Deceased Partner. — Since the survivors stand toward the representatives of the deceased in the position of trustee to *cestuis que trustent*, they are subject to equitable control in case of abuse of trust only, on the principles controlling in the case of other trustees with full discretion in the management of the trust. This includes the right of the executor or administrator of the deceased to demand an accounting, and to enforce that right in equity.

The separate creditors, legatees, and next of kin of the deceased partner have no *locus standi* against the surviving partner, but only against the executors or administrators of the deceased, unless there be collusion between these persons, or circumstances exist which prevent the representatives themselves from obtaining a decree for an accounting. If the administrator fails to compel a speedy accounting by the surviving partner, he is himself guilty of *laches*.

It appears to be generally held that partnership assets must first be applied to the payment of partnership debts and the advances of either partner, before the other partner or any one through him has any claim on them. This principle would, of course, exclude the right of the widow to an allowance out of the partnership assets, as well as any other person claiming as his legal representative.

§ 120. Distribution of Partnership Effects. — Upon the payment of all the partnership debts and expenses of liquidation, a specific division of all the remaining assets may be made between the surviving partners and the personal representatives of the deceased partner, if they so agree. But each party may, in the absence of such an agreement, and where the partnership contract stipulates no division in a different manner, insist on a sale of the joint stock; and where a court of equity winds up the concerns of a partnership it is usually done by a sale of the property, whether real or personal, and a conversion of it into money; but there may be cases in which the peculiar circumstances would make a sale injurious, and where the true interest of all parties may be better preserved and pro-

teeted without it. It seems to be understood that a sale at public auction is most favored, because at such a sale all interested parties may be present, and bid to prevent a sacrifice of the stock; but there is no conclusive rule upon the subject, and the circumstances of each case must suggest the best course to be adopted. The representatives of the deceased partner may sell the interest of the latter to third persons, or to the survivor, if the sale is fair and honest; but not where the surviving partner is also executor or administrator of the deceased partner. The surviving partner cannot shield himself from responsibility for the true value of partnership property bought secretly and indirectly by himself, by showing that the sale was under judicial authority; nor where bidders were deterred for his benefit from bidding, although in consequence of deceit he did not obtain the property. He has no right, in the absence of provision in the partnership articles, to appropriate the firm assets, although willing to pay the value thereof. And he is chargeable with any increase in value between the appraised value and actual value. But the court may, upon a proper showing, permit the surviving partner to retain the assets upon payment of their full value.¹

§ 121. Good Will of Partnership.—The good will of a firm dissolved by the death of one of its members has often a marketable value, and in such case it is liable to be sold for the benefit of all the partners, like any other property of the firm. In such case it must be taken into consideration in the valuation of the stock, and the proceeds of its sale become assets for the payment of debts or distribution between the deceased and surviving partners. But it is not always either valuable or salable. It is described as the sum which a person would be willing to give for the chance of being able to keep the trade established at a particular place, or rather it is the price to be paid for the advantage of carrying on business either on the premises or with the stock of the old firm, or connected therewith by name, or in some manner attracting the customers of the old to the new business. Upon the sale of an established business, its good will has obviously a marketable value; but

¹ Woerner on Administration (first paragraph), § 127, and authorities there cited.

this depends largely, if not entirely, on the absence of competition on the part of those by whom the business has been previously carried on. Hence, since a surviving partner is under no obligation either to retire from business merely because the partnership is dissolved, or to carry on the old business so as to preserve its good will until the final winding up of the partnership affairs, its market value is often destroyed or inconsiderable. So too the sale of an establishment *in toto* will carry with it the good will to the purchaser; and if a lease, being the property of a partnership, be sold, the good will passes with it to the person purchasing. In such cases the good will is included in or constitutes a part of the value of the thing sold, and it follows that it can be valued or sold only in connection with such property; the stock or business sold is enhanced in value by the estimated value of such good will. Where the good will is the subject of a special contract, or arises out of it, it assumes a more tangible shape, and may be valued and assigned with the rest of the effects; it is described by Collyer as "an advantage arising from the fact of sole ownership to the *exclusion* of other persons." Good will of this kind, being a valuable addition to a trade, cannot be implied from the general words "stock, effects, &c.," but must be created by some appropriate words; and it has been held that the naked sale of the good will of a business does not transfer a right to the use of the vendor's name of trade. Nor can a surviving partner, without the consent of the representatives of the deceased partner, use the firm name or the name of the deceased partner in continuing the business.

§ 122. **The Real Estate of the Partnership.** — It is now well recognized, that as between copartners there is in reality no difference whether the partnership property held for the purposes of trade or business consists of personal or real estate, or of both, so far as their ultimate rights and interests are concerned. However the title may stand at law, real estate belonging to a partnership will in equity be treated like its personal funds, disposable and distributable accordingly; and the parties in whose names it stands, as owners of the legal title, will be held to be trustees of the partnership, accountable accordingly. Hence in equity, in case of the death of one partner, there is

no survivorship in the real estate of the partnership, but his share will go, after payment of the partnership debts, to his proper representatives; but all real estate purchased with partnership funds for the use of the firm, and employed in the partnership business, is in equity regarded as assets of the partnership, and will be applied to the liquidation of partnership debts in preference to the debts of individual members of the firm. The dower interest of the widow of a deceased partner depends upon the contingency whether any portion of the proceeds of sale of partnership real estate remains to the share of her deceased husband after the payment of all the partnership debts, and advances made by the other partners; hence she has no claim to dower in the lands sold or mortgaged by the firm, although she did not join in the sale, but may have a dower interest in the balance of the purchase-money so remaining, which is then treated as real estate. So each partner has an equitable interest in that portion of the legal estate held by the other, until all the debts obligatory on the firm, including advances by any of the partners to the firm, are paid, and the rights of the deceased partner's widow, legal representatives, heirs, and creditors are postponed to such payment. But such partnership real estate as may not be required for the payment of partnership debts or the adjustment of balances between the partners is, in the settlement of the estate of a deceased partner, generally, — at least in cases where the partners have not by either an express or implied agreement indicated an intention to convert the land into personal estate, — treated as realty; although in some cases, both in England and America, the character of personalty, once attaching to such property by reason of having been purchased with partnership funds or used for partnership purposes, is held to continue until final distribution. Whether an agreement to buy and sell lands and share in the profits of the sale converts the land absolutely into personalty, has been held both ways. The current of authorities seems to regard lands bought by a firm engaged in the business of speculating in real estate as personal property for all partnership purposes; but after winding up the partnership and fully settling its affairs, the realty then remaining on hand resumes its legal characteristics.

§ 123. **History of the Missouri Statute as Typical of Modern Partnership Administration.**—Under the system discussed above, probate courts have nothing to do with the settlement of partnership estates. Some States have statutes looking toward subjecting the settlement of partnerships dissolved by death of a member to a greater or less extent to the control of the probate court.

The Missouri statute may be studied with profit as typical of the development from the common law to the modern conception. It is very full, and gives greater powers over surviving partners to the probate court than is given to it in any other State. Its history furnishes a striking instance of the increasing confidence in the efficiency of probate courts, and of the tendency of the legislation in the American States to enlarge the scope of their powers and jurisdiction, and for this reason the historical evolution of the Missouri law is traced in the subjoined note.¹

¹ The first legislative enactment subjecting surviving partners to the jurisdiction of probate courts is in Rev. Stat. 1845, incorporating the substance of the Maine statute. In 1849 the probate court was authorized to order a surviving partner, upon petition of two-thirds in interest of the creditors, and proof that injustice would not be done to other parties, to adjust, close, and settle the business of the firm without such bond or security; but it was specially enacted that such surviving partner shall in other respects be subject to the control and superintendence of the court. In the Revised Statutes of 1855, the right to give the bond, and to administer the partnership effects, is limited to surviving partners residing in the State and such administration is directed to be had in the county in which the partnership business was conducted. Authority is also given to the surviving partner to pay partnership debts, without requiring them to be exhibited for allowance in the probate court; but where the administrator of the deceased partner administers the partnership estate, and also where the surviving partner refuses to pay demands against the partnership, provision is made for the allowance and classification of such demands. Provision is made for the appearance of surviving partners, when a claim is presented against the partnership estate administered by the administrator of the deceased partner, and authority given them to defend against such claim, and appeal from the decision of the probate court. It is also provided, that the administration of the partnership effects shall in all things conform to administrations in ordinary cases, and that the person administering, and his sureties, shall perform the same duties, be governed by the same limitations and restrictions, and be subject to the same penalties, as other administrators and their sureties. The General Statutes of 1865 introduced no change; but in the Revised Statutes of 1879 the language subjecting surviving partners to the jurisdiction of the

probate court is made peremptory and comprehensive: "The administration upon partnership effects, whether by the surviving partner, or executor or administrator of the deceased partner, shall in all respects conform to administrations in ordinary cases, except as herein otherwise provided, and the person administering upon partnership effects, and his sureties on his official bond, shall perform the same functions and duties, be governed by the same limitations, restrictions, and provisions, and be subject to the same penalties, liabilities, and actions, as other administrators and their sureties." In 1883 the legislature introduced a further provision requiring the surviving partner administering to pay partnership debts *pro rata*, according to their respective classes, securing to all the creditors an equal participation in the assets of insolvent partnerships.

In 1885 the legislature made provision for compensation to surviving partners administering the partnership effects.

In the Revision of 1889 (which remains unchanged in all respects in the Revisions of 1899 and 1909), the division of claims against partnership estates into two classes, according as they are presented for allowance within the first or second year, is repealed, and creditors are now required to present their claims for allowance within the first year of the administration, or be forever barred against the partnership effects under administration.

The history of this statute, together with the interpretations it received from the judiciary in the various phases of its development, strikingly illustrates, also, the difficulty attending the introduction of principles which require, on the part of judges and lawyers, a departure from the familiar, well-trodden paths of the common law. The interesting story of that struggle is given in Woerner on Administration, § 129.

CHAPTER XIII.

ESCHEATS.

§ 124. **Devolution of Property in Default of Heirs.** — Property of deceased persons necessarily vests in the State if no one is competent to take it as heir or testamentary donee. "It seems to be the universal rule of civilized society, that when the deceased owner has left no heirs it should vest in the public and be at the disposal of the government."¹ Such property is said to *escheat*, — a term applied in the common law to the reversion of an estate to the lord from whom it was held, either *propter defectum sanguinis*, *i. e.*, on account of the failure of heirs of the grantee, or *propter delictum tenentis*, *i. e.*, on account of the felony or attainder of the tenant. Of course, there can be no escheat in this country on the latter ground (nor in England, since corruption of blood and forfeitures and escheats are done away with by statute); hence, in the United States, escheat signifies a reversion of property to the State in consequence of a want of any individual competent to inherit. Our present law on the subject is developed from the law of escheats: it has no connection with forfeitures. Within the States of the American Union escheats for defect of heirs are to the State in which the property is situated and not to the United States.²

¹ Bouv. Law Dict.: "Escheat."

² In this connection it is appropriate to refer to an interesting case recently decided by the federal Circuit Court of Appeals, first circuit. Personal property was discovered on the body of an unknown decedent found floating on the high seas, out of the jurisdiction of any particular State and of the United States, was brought to Massachusetts by the salvors and held in the custody of a federal district court for disposition after being libelled for salvage; the fund was claimed by the public administrator administering the estate under the State law, and by the United States as having a superior right to the fund; the court held that although it was within the constitutional powers of the Congress to legislate respecting the control of funds such as that in question, yet in the absence of such legislation the United States could make no claim thereto, and that "the State may act until and except so far as the United States

§ 125. **Escheat at Common Law.** — In its strict common-law sense escheat applies only to realty. As pointed out heretofore in discussing alienage,¹ whenever the State asserts its right of escheat against an alien who claims by purchase as distinguished from descent, there is necessity for an "inquest of office," or "office found," as the proceeding to ascertain the sovereign's title is called. But "whenever the owner dies intestate without leaving any inheritable blood, or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the State by operation of law. No inquest of office is requisite in such cases."² But there will be no escheat so long as there are heirs capable of inheriting: if some of the next of kin be incapable by reason of alienage to take, the inheritance descends to such as are competent, as if such aliens had never existed.

§ 126. **Escheats under the Statutes of the Several States.** — Escheat in the feudal sense has never existed in America, at least not since the Revolution, but has here become a falling of the estate into the general property of the State, either because the tenant is an alien, or because he has died intestate without lawful heirs to take his estate by succession. This principle includes personal property as well as real, and is so treated in the statutes governing the subject in the several States.

Under the old common law the interest of the *cestui que trust* did not escheat, which was one of the inducements leading to the use of trusts, but the American doctrine also includes intervene"; that the common law of England, giving the Crown the right to lost property was not applicable to the case, it being "enough to say that whatever was the title of the king at common law, it was based on royal prerogative, was appurtenant to the crown and was, for the most part, classified among the royal revenues"; and that "while there can be no question that the sovereign people in Anglo-Saxon America, whether the various States or the United States, did, in some way, succeed to all the rights of the English King and of the English people, yet, until some recognized line of procedure, or some action of Congress intervenes, it is not within the province of the courts to determine that the treasury of the United States represents any particular royal prerogative." And it was held that the estate be administered by the Massachusetts laws, particularly since provision was thereby made for the claiming of the funds by the possible heirs within a number of years: *United States v. Tyndale*, 116 Fed. R. (C. C. A.) 820.

¹ *Ante*, § 12.

² 4 Kent * 424; *Farrar v. Dean*, 24 Mo. 16.

property held in trust, whether by express enactment of the statute, or as a necessary consequence of the right of the State as *ultimus hæres*.

§ 127. **Need of Inquest of Office under Statutes.** — The doctrine of the common law just stated, that “inquest of office” is necessary only against an alien who takes by purchase, holds good in the United States, except where such proceeding is directed by express statute. The statutes of a few states require such a proceeding both as to realty and personalty; a larger number limit the requirement to realty, leaving the disposition of personalty of such as die without ascertainable distributees to the jurisdiction of the Probate Court.

§ 128. **An Official as Representative of the State.** — In most of the States it is made the duty of some officer, specially vested with authority for such purpose, to investigate and ascertain whether property, real or personal, have escheated, and to take all needful steps in securing such to the State. With rare exceptions, the proceeds of escheated property are dedicated in the several States to the general school fund, or otherwise appropriated for the purposes of public instruction. It is held, that the beneficiaries of these donations acquire a vested right to the property escheated, as soon as the facts which give rise to the escheat exist; hence a law changing the destination of escheats can operate prospectively only. The law in force at the time of the death of one who leaves only alien heirs determines the question of escheat; and a treaty securing to aliens competent to inherit real estate the right to such inheritance, confers no right upon an alien who was, at the time of the intestate's death, incompetent, though subsequently aliens were by statute enabled to hold real estate by inheritance.

§ 129. **Escheated Estate Subject to Trusts.** — Chancellor Kent, in his Commentaries, mentions with disapprobation “a very inequitable rule of the common law, that if the king took lands by escheat, he was not subject to the trusts to which the escheated lands were previously liable”; and says, that “the opinion in England is understood to be that, upon the escheat of the legal estate, the lord will hold the escheat free from the claims of the *cestui qui trust*”;¹ and he points out

¹ 4 Kent, * 425-426.

certain English statutes as calculated to check the operation of so unreasonable a principle. In America the principle is universally recognized, that, where property escheats, the State takes precisely the title which the party dying had, and no other. It is taken in the condition and to the extent in which he held it. This is the necessary result of the principle that escheat in America means only the substitution of the State to the rights of an owner who is incompetent to hold the title, or as heir to an estate in case there be no other heir competent to take it.

§ 130. **Subsequent Recovery by Heir from the State.** — Most of the States make liberal provisions to enable heirs to recover property even after judgment of escheat, if they were not parties to the inquisition, and had no notice of the proceeding. Where money and the proceeds of the sale of personal or real property have been paid into the State treasury, the relief consists in a provision authorizing the payment of the net amount of the escheat to the claimants who within a certain time make sufficient proof of their title.

§ 131. **Administration of Escheated Estates.** — It is provided in the statutes of some of the States, that where a person dies leaving no competent heirs, there shall nevertheless be administration of his estate in the usual manner. It is obvious that in these States the object of the law is fully accomplished by placing the State in the category of an heir, represented in all matters requiring representation, in court or otherwise, by the official escheator or person designated to guard the interest of the State in such proceeding; and the rights of creditors or other claimants against such estate are adjudicated precisely as if there were no question of escheat. In other States the necessity of administration in the usual form results from the absence of legislation directing the management of escheated estates.

TITLE TWO.

OF THE INSTRUMENTALITIES EFFECTING THE DEVOLUTION.

§ 132. **Tribunals and Officers employed by the Law to accomplish the Devolution.** — Having in the preceding pages pointed out the principles which determine the succession of property upon the death of its owner, and considered the various channels through which it descends to the new owners, it seems natural now, in the further development of our subject, to examine the instrumentalities employed by the law to accomplish and control the devolution. It seems more convenient, in doing this, though not, perhaps, in strictly logical sequence, to consider, in the first place, the nature, scope, and power of the various courts and tribunals armed with jurisdiction in this respect; and, next, the nature and extent of the authority of those officers whom the law intrusts with the active administration of the estates of deceased persons.

PART I.

OF THE TRIBUNALS CONTROLLING THE ADMINISTRATION
OF THE ESTATES OF DECEASED PERSONS.

CHAPTER XIV.

PROBATE POWERS AS EXISTING AT COMMON LAW UNDER
ENGLISH STATUTES.

§ 133. **Origin of the Ecclesiastical Jurisdiction over Probate of Wills.** — It is indispensable to a proper understanding of the nature of Probate Courts in the United States, to examine, to some extent at least, the method of settling estates of decedents in England, in order to gain an insight into the principles and doctrines of the common, civil, and canon law constituting the unwritten presuppositions, tacitly understood and premised, of American statutes regulating the administration of the estates of deceased persons. Much that seems contradictory, capricious, or incomprehensible in the several enactments and decisions, will be seen to harmonize, and the principles of the civil and canon law, vitalizing the dry formulæ of the common law, will serve to fill out and round off the statutory provisions.¹

This branch of English jurisprudence, or rather of practice under the common law, was for a long time, and until quite recently, known as well by the name of ecclesiastical as by that of testamentary or probate law, because the clergy had assumed testamentary jurisdiction and exercised it in their spiritual courts. In England, although the claim and practice of spiritual courts in this particular is said to have been originally a mere

¹ Courts of probate "exercise many powers solely by virtue of our statutes; but they have a very extensive jurisdiction not conferred by statute, but by a general reference to the existing law of the land, that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law": Bell, C. J., in *Morgan v. Dodge*, 44 N. H. 255, 258.

usurpation, it became a privilege enjoyed by them, not as a matter of ecclesiastical right, but, as Blackstone puts it, by the special favor and indulgence of the municipal law, producing what he terms "a peculiar constitution" of the island.

This jurisdiction, exercised in the county court, where the bishop and the earl sat conjointly for the transaction of business until the separation of the ecclesiastical from the secular jurisdiction by William the Conqueror, was plausibly claimed by the bishop, as being in harmony with the customs of the Normans, and the civil and canon law, which gave to bishops the charge of the execution of testaments containing bequests *in pios usus*. It is certain, says Bradford, that the constitution of the ecclesiastical tribunals was authorized by William; and that their jurisdiction included the probate of wills soon after, if not from the instant of separation from the county courts, is almost capable of direct proof.¹

§ 134. **Origin of Administration in England.** — Anciently, says Blackstone, the king, as *parens patriæ*, seized upon the goods of persons dying intestate and administered them through his ministers of justice, probably in the county court; and the prerogative was granted as a franchise to many lords of manors, and others, who continued to hold, by prescription, the right to grant administration to their intestate tenants and suitors in their own courts baron. While the franchise so granted remained in the prerogative and prescriptive courts for many centuries, and until the passage of the Probate Act, together with the jurisdiction to grant probate of wills of personalty, the jurisdiction formerly exercised by the king or his representatives was vested in favor of the Church in prelates, "because it was intended by the law that spiritual men are of better conscience than laymen, and that they have more knowledge what things would conduce to the benefit of the soul of the testator than laymen have."² The Church, accordingly, obtained the supervision of the distribution, or administration, of the personal property of intestates; the ordinary might seize them and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money *in pios usus*.

¹ 1 Bradf. XXII; 3 Blackst. 96.

² Perk. Prof. Book, § 486.

The State soon sought to limit the powers originally conferred without restrictions, and legislated in that direction. The Statute of Westminster II (A. D. 1285) directed the ordinary to pay the intestate's debts so far as his goods extend, which he could not be compelled to do before that act. Even after it, the ordinary was not accountable for the residuum after payment of debts, until by the Statute of 31 Edward III (A. D. 1358) the estates of deceased persons were directed to be administered by the next of kin of the deceased, if he left no will, and not by the ordinary or any of his immediate dependants. This statute originated the system of confiding the settlement of the estates of intestates by their next of blood, appointed by the ordinary, putting them, with respect to suits and accounting, upon the same footing with executors, and making them officers of the ordinary.

§ 135. **Powers of Ecclesiastical Courts in England.**—The common law of England, as affected by the statutes above named, and such of those noticed below as were enacted before the settlement of the American Colonies, is at the basis of the American statutes concerning administration, and of the law in the American States in so far as it has not been supplanted by their own statutes. It is therefore necessary to follow still further the history of the English law on this subject.

The Statute of Distributions¹ destroyed the common-law right to the *pars rationabilis*, and made the estate distributable among the widow and next of kin, leaving still, however, in the hands of the administrator, for his own use, the third formerly retained by the Church, until finally, by the Statute of 1 Jac. II, c. 17, this third was made distributable, as well as the remainder of the intestate's estate.²

The powers of the spiritual courts were thus restricted to the judicial cognizance of the class of cases arising out of the probate of wills, the grant of administration, and the payment of legacies, and thus remained until, by the statute creating the court of probate,³ their powers in this respect were wholly abrogated. The authority to appoint administrators, and to take proof of wills, resided in the bishop of the diocese wherein

¹ 22 and 23 Car. II, c. 10; 29 Car. II, c. 30.

² 1 Bradf. XXVI.

³ 20 and 21 Vict. c. 77.

the testator or intestate dwelt at the time of his death, unless he left effects to such an amount as to be considered notable goods (*bona notabilia*, fixed by the ninety-third of the canons at the value of £5 or over) within some other diocese or peculiar; in such case the will was to be proved before the metropolitan of the province by way of prerogative, whence the courts, where the validity of such wills was tried, and the offices where they were registered, were called the prerogative offices of Canterbury and York.

The spiritual jurisdiction of testamentary causes is described by Blackstone as "a peculiar constitution of this island; for in almost all other, even Popish countries, all matters testamentary are under the jurisdiction of the temporal magistrate."¹ It was exercised by the consistory courts of diocesan bishops, and in the prerogative court of the metropolitan, generally, and in the arches court and court of delegates by way of appeal. It is divisible into three branches, the probate of wills, the granting of administrations, and the suing for legacies, in respect to the latter of which the jurisdiction is concurrent with courts of equity.

As the rules of the canon and civil law had been adopted by the ecclesiastical courts, they gradually became the basis of the ecclesiastical law, prevailing, not *proprio vigore*, but only so far as the custom and prescription have admitted them in the spiritual courts. "The proceedings in the ecclesiastical courts," says Blackstone,² "are therefore regulated according to the practice of the canon and civil law; or rather, according to a mixture of both, corrected and new-modelled by their own peculiar usages and the interposition of courts of common law. . . . But the point in which these jurisdictions are most defective is that of enforcing their sentences when pronounced, for which they have no other process but that of *excommunication*; which is described to be twofold: the lesser and the greater excommunications."³

¹ 3 Bla. Comm. * 95.

² *Ibid.*, * 100.

³ By act of 53 Geo. III, c. 127, the sentence of excommunication was displaced by the writ *de contumace capiendo*, issued out of chancery upon the *significavit* of the ecclesiastical court.

§ 136. **Probate Jurisdiction in Other English Courts.** — The extent of jurisdiction exercised by the ecclesiastical courts of England included but a small proportion of the judicial authority involved in the adjudication of questions arising in the settlement of dead men's estates. To some extent, the power to pass upon the accounts of executors and administrators, if no trial of issues, either of fact or law, was necessary, and to grant them a discharge after a true accounting seems to have been exercised by the ecclesiastical tribunals. But the trial of disputed accounts, involving the testimony of witnesses, questions of *devastavit*, liability to creditors, legatees, and distributees, the marshaling of assets, recourse to real estate for the payment of debts and legacies, etc., — in short, the control over executors and administrators in every respect not included in the probate of wills, appointment of administrators, and payment of legacies, — was exclusively in the common-law and chancery courts, as well as the appointment and removal of guardians and curators to minors and persons of unsound mind, and the control over them in respect of the management of their estates. It should therefore be remembered that there is a very great difference between the totality of the powers exercised by the English courts in connection with the administration of estates of deceased persons, sometimes called testamentary or probate jurisdiction, and the testamentary or probate jurisdiction of ecclesiastical courts, — a distinction which is of the utmost importance in ascertaining the conclusiveness of the judgments and decrees of the several classes of courts in collateral proceedings, and also in comparing the relative powers of ecclesiastical courts with those of American probate courts. For although the tribunals established in the Colonies were at first modelled after those of the mother country, whose functions they were to perform, so that they were to some extent governed by the rules of the civil and canon law, and in some instances took even the name of their prototypes, yet in the course of time they were invested with greater powers and jurisdiction, and to fit them for the efficient exercise of the new functions invested in them, they were made courts of record, with a public seal and a clerk; they have organized process and executive officers, stated terms, and continued functions. The

several legislatures, being at perfect liberty to adapt the constitution and powers of the courts to the requirements and convenience of the people, invested these tribunals, not only with the powers possessed by the spiritual courts in England, but, in most instances, with all the powers possessed by the English ecclesiastical, common law, and chancery courts, in so far as they were necessary to control the administration of decedents' estates; and within the sphere of the jurisdiction conferred upon them they are a branch of the judiciary of the State, as much so as any other court of general or plenary power.

CHAPTER XV.

NATURE OF PROBATE COURTS IN AMERICA.

§ 137. **Origin of Probate Courts in America.**—The essential characteristics of courts whose office it is to control the administration of estates not owned by persons competent to *aet sui juris*, have been indicated in an earlier chapter. It will appear from the consideration of the nature, power, and scope of the courts intrusted with this species of jurisdiction in the several American States, to what extent the principle, there mentioned as resulting from the nature of property and the office of the State, has been practically realized and found recognition in the statute-books. It is easy to understand why this principle was so inadequately recognized, and never expressed as an organic element of the law, in England.

But in America circumstances have been peculiarly favorable to the rational development of this principle. Ecclesiastical courts with secular powers did not exist. Prerogatives and prescriptive rights were swept away by the republican spirit of the people. The legislatures were unhampered by the traditions and customs of the mother country, armed with full authority to carry out the views and convictions of the people, who thus exerted a controlling influence in shaping the law and regulating the practice of managing and settling estates of deceased persons and minors; for no branch of the law concerns the general public so universally, and affects their interests so directly, as this. The consequence has been a rapid development of the law of administration, particularly in those States which early cut loose from the common-law doctrines in this respect. The American courts of probate, with their extensive powers, their simple and efficient procedure, their happy adaptation to the wants of the people in the safe, speedy, and inexpensive settlement of the estates of deceased persons attest the marvellously clear insight of the people of the Colonies and young States into

the principles involved, and the genuine instinct which guided them in their realization. Necessarily diverse in their details, as the systems of the several States cannot but be, since each State enacts its own code, there is a common intendment of them all in the direction of recognizing the law of administration as a distinct, independent branch of jurisdiction, based upon and determined by its own inherent principles. The rich and manifold experiences of over a century of unexampled national growth and development have tended to mould these systems in the national spirit common to all the States; as each is the reflex of the nation, so their institutions are rapidly assimilating into a national system, in which the incongruities incidental to the experimental enactments of the several and independent legislatures are gradually disappearing before the light of common experience and intelligent discussion.¹

§ 138. American Statutes the only Source of Probate Powers in the States.— We have seen that by the common law the entire scope of jurisdiction over the estates of deceased persons vested in the ecclesiastical, common-law, and chancery courts. Hence, there being no ecclesiastical courts in America, all such jurisdiction, in so far as it became a part of the juridical system of the States, necessarily vested in the common-law and chancery courts, to the extent in which it was not lodged elsewhere by statute. It follows from this, that although in many of the States the constitution establishes or provides for the establishment of courts of probate, yet they take all their powers from the statutes regulating them.

From this circumstance arises an important rule to be observed in ascertaining the extent of power lodged in any one of this class of courts: they can exercise such powers only as are directly conferred upon them by legislative enactment, or necessary to carry out some power so conferred. Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceeding is void.² But where jurisdiction is conferred over any subject-matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no juris-

¹ Woerner on Administration, § 141.

² *Ibid.*, § 142.

diction has been conferred, the court must, of necessity, decide such collateral issues.

The courts so created took various names. In many of the States they are known as Probate Courts, or Courts of Probate, which is also the name given to the English court created in 1857, to which the jurisdiction previously exercised by ecclesiastical, manorial, and other courts of testamentary jurisdiction was transferred. This term is indicative of one of the chief and characteristic elements of their powers, and is used in this treatise to designate all courts of this class, being at once the most convenient, familiar, and accurate.

§ 139. **Their Dignity as Courts.** — In consequence of statutory origin of courts of probate, they have been said to be courts of limited, inferior, special and limited, limited though not special, or limited though not inferior jurisdiction. The result of this peculiarity, *i. e.*, their lack of all power save as conferred by statute, has been, in some of the States, to deprive their judgments and decrees of all validity unless the facts upon which their jurisdiction depends appear affirmatively from the face of their proceedings. But this view does not seem sound on principle; it ignores the character of these tribunals *as courts*, and the necessity that their judgments and decrees should be binding, as authoritative announcements of the law, upon all the world. It is held that federal courts, although of limited jurisdiction, are not inferior courts in the technical sense; and that their judgments, although reversible by writ of error or appeal, are binding, although the jurisdictional facts be not alleged in the pleadings. The doctrine that judgments of probate courts are void unless the facts upon which their jurisdiction depends appear of record arose probably from the necessity of the application of such a rule to the ecclesiastical courts of England, whose jurisdiction was exceedingly limited, which were not courts of record, possessed no means of enforcing their judgments or decrees, and whose exercise of jurisdiction was jealously scanned by the temporal courts to guard against encroachment and usurpation. No one of these reasons exists in the United States.¹ Courts of probate in America are entitled to the sanction which every court of record holds; they are not

¹ *Tucker v. Harris*, per Lumpkin, J., 13 Ga. 1, 8.

to be classed with those tribunals which have no authority beyond special powers for the performance of specific duties, little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed by the statute,¹ but are of that class of courts whose judgments, like those of the federal courts, are held good without a recital of the facts upon which they rest. The subject of the validity of judgments and decrees of probate courts is more fully considered hereafter.

§ 140. Their Powers as Judicial Tribunals. — They are in most, if not all, of the States courts of record, having a public seal and a clerk, or authority in the judge to act as clerk, organized process, and executive officers, as well as stated terms and continuing functions. Within the field of their jurisdiction they are as much a branch of the judiciary of the State as any court of general or plenary powers. As judicial tribunals they have the inherent power as such to punish for contempt to the same extent as common-law courts, to compel obedience to their orders and decrees, and their judgments upon matters within their jurisdiction are enforced, usually, by the same means which are at the disposal of common-law and chancery courts. Their orders, judgments, and decrees are therefore as conclusive upon the parties to the record, until reversed or annulled on appeal, writ of error, or direct proceeding in chancery for fraud, as decrees in chancery or judgments at law;² but if want of jurisdiction appears from the face of the proceedings, they are, like the judgments of any court under like circumstances, merely void.

Although these courts are courts of record, it does not follow that they recognize an "attorney of record." Parties in interest may appear in person, by agent, or attorney at law; they may appear by one attorney at one hearing, and by another on the next. Notice or process served upon an attorney is of no more avail than if served upon a stranger, unless the party respond to the notice or summons.

§ 141. Conclusiveness of their Judgments in Collateral Proceedings. — The development and growth of the jurisdiction of

¹ Such as commissioners, surveyors, appraisers, committees, directors, overseers, and the like: *Obert v. Hammel*, 18 N. J. L. 73, 79.

² Woerner on Administration, § 144.

courts of probate in the United States has given occasion to considerable divergence in the authorities on the question whether their judgments are conclusive, or impeachable collaterally — that is, in a proceeding not directly assailing the judgment in question. The uncertainty produced by the vacillation of courts in this respect is not only perplexing to the administrators, practitioners, and judges, but injurious and sometimes ruinous to the interests of all persons concerned in the administration of estates; and particularly to the purchasers of real estate sold under the order of probate courts, who sometimes lose the fruits of their purchase because the officers of the court are not sufficiently skilled or careful to let the record show all jurisdictional facts; and to the heirs or creditors, because the risk incurred by purchasers depresses the price of the property at the sale.

On principle there seems to be no difficulty attending the question, except, perhaps, to ascertain whether the tribunal intrusted with jurisdiction in probate matters is *a court*, with *judicial functions* in the common-law sense, or whether its functions are *ministerial only*, or having no authority beyond special powers for the performance of specific duties not relating to the general administration of justice. If the latter be the case, it is obvious that, to give validity to its acts, it must affirmatively appear that everything necessary to such end has been observed. But if it be found that the tribunal is one competent to *decide* whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments within the scope of the subject-matters over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. It matters not how erroneous the judgment: being *a judgment*, it is *the law* of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally, would be to ignore practically, and logically to destroy, the court. And it is not necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the face

of their proceedings, because, being competent to decide, and having decided, that such facts exist by assuming the jurisdiction, this matter is *adjudicated*, and cannot be collaterally questioned.

The English ecclesiastical and manorial courts were not courts in the common-law sense, — “they did not proceed according to the common-law,” — hence the English rule requiring them to show jurisdictional facts on the face of their proceedings.

Many of the American courts of probate were, in early colonial times, modelled after the ecclesiastical courts; hence the necessity of the same rule as applicable to their acts, and the early American cases so holding.

In the progress of time, however, most of these courts were remodelled and vested with greatly increased judicial powers, made courts of record, etc. The reform was initiated and carried out by the legislative branch of government, — the only one having power to accomplish it, — thus compelling the judiciary to follow; and it is but natural, perhaps, that they followed reluctantly. Lawyers and judges were equally imbued with the doctrines of the common law which ignored the ecclesiastical courts as judicial tribunals; and they found it difficult to assign to the American probate courts a different status. And since the enlargement of their powers emanated from as many different sources as there are States, and proceeded in as many different channels, it is not strange that for a long time there was very great divergence in their decisions. It is gratifying to observe, however, that, while unanimity has by no means been attained, yet the magnitude of the divergence is gradually diminishing, in the proportion in which the principle upon which these courts rest is understood and practically realized.

Thus it is denied by the federal courts that courts of probate are in any technical sense *inferior* courts, and their judgments within the sphere of their jurisdiction are as conclusive as those of the circuit or any other general court, and entitled to the same intendments and presumptions in their favor. A great majority of the States hold the same doctrine; but several still require that in order to secure the validity of judgments of probate courts against collateral assailability substantial

compliance with the statutory requirements must be affirmatively shown by the record.¹

§ 142. **How far Probate Courts may correct their Judgments.** — The rule, applicable to all common-law courts, that during the continuance of the term the record remains in the breast of the judge, and the record as well as the judgment itself may be altered, revised, or revoked, as well as amended in respect of clerical errors and matters of form, is equally applicable to probate courts. All the days of the term are considered as one, and everything is in the power of the court during its continuance. But this power must not be exercised unless the parties to be affected are present in court, or have notice, so that they may be heard if they desire; and the presence of the parties, or notice to them, must appear from the record itself; no presumption of notice arises where the record is silent. Any change or amendment must also be upon such terms as will protect the interests of third parties.

But a court can neither change nor disregard its orders, judgments, or decrees after the lapse of the term at which they were rendered. It is consistent with this principle that it is the duty of a court, if the judgment, decree, or order is clearly void for the want of jurisdiction, or other defect apparent from the record, to vacate the same upon proper application. But in the absence of statutory grant of power to open orders and decrees, or to grant rehearing to litigants, they have no power to revise their decisions on the ground of error, either of law or fact; except, as will be more fully noticed below, during the continuance of the term at which they were rendered. The subject is affected by statutes in some States.

§ 143. **Entering Judgment *nunc pro tunc*.** — The power to record a judgment or order at any time after it was rendered, and to correct a judgment or order erroneously entered, resides in the probate courts equally with common-law courts. This power originated in the maxim, that "an act of the court shall prejudice no one," or, as worded by Freeman, "a *delay* of the court shall prejudice no one," and was originally employed to relieve parties from hardships arising out of the delay of courts, by entering a judgment *nunc pro tunc* as of the day on which

¹ See Woerner on Administration, § 145.

it ought to have been rendered; but is now resorted to for the purpose of entering of record judgments rendered, but through inadvertence not entered, and of correcting judgments erroneously entered, *nunc pro tunc*, as they ought originally to have been entered of record.

There is some difference of opinion as to the circumstances which shall be sufficient to authorize a *nunc pro tunc* entry. The purpose to be accomplished is salient enough; it is to secure a true record of the precise ruling of the judge as originally pronounced, in cases where the record is silent, or inaccurate, or false. But the question here arising, How is the truth of the entry to be established? is not so easily answered.

The logical and safe rule seems to be that laid down in the English statutes on this subject. The rule deducible from these statutes is, that no amendment of the record can be made unless there be a mistake of the clerk, and something in the record by which the mistake can be rectified.

This rule is adhered to in the federal courts, and in a large number of States. In other States, entries *nunc pro tunc* are allowed upon parol evidence or upon the memory of the judge.

The correction of the record must be drawn with the view of protecting the rights of third parties acquired by virtue of the original entry and before correction thereof, and after notice to the parties to be affected by it.¹

§ 144. **Proceeding in Rem and in Personam.** — The expression is often used, in asserting for the judgments of probate courts a validity not claimed for them in respect of judgments *in personam*, that from the nature of the jurisdiction exercised by them they proceed *in rem*. The judgment, being *in rem*, it is said is conclusive upon all the world, and hence all persons whatever have a right to be heard in the proceeding. Even parties not *in esse* at the time of the judgment have been held to be concluded. The judgment however is only as to the *res* or status established, as to which persons in interest could be heard, and the expression that the decree is binding on all the world does not mean that it is binding in a collateral proceeding, as to the facts found, so far as persons who were strangers in interest to the proceeding are concerned; hence the binding

¹ Woerner on Administration, § 147.

effect of the decree *in rem* is limited to the assets within the State, and is not extended so as to conclude the courts of another State as to the assets there. Possession of the thing (custody of the *res*) is one of the essential conditions of jurisdiction over the thing. Every other requisite may be conceded; and if executors and administrators be looked upon as officers of the court, so that possession by them may be considered possession by the court,¹ the disposition of personal property by order or judgment of the probate court is clearly a proceeding *in rem*. The law vests title to all personal property of a decedent in his executor or administrator, and requires the latter to notify "all the world," by publication, of his assumption of the office, — a proceeding constituting the notice, monition, or proclamation required to obtain jurisdiction *in rem*. The same principle is applicable to real estate, where, as is the case in a number of States, it passes to the personal representative.

But the title to real property vests, in most States, not in the executor or administrator, but in the devisee or heir. Hence, in all of these States, the essential requisite of jurisdiction *in rem*, possession, the custody of the *res*, is wanting in respect of real estate. It is provided in most States that notice must be given to the heirs, or others interested in real estate, either by personal service or publication, before real estate can be subjected to the satisfaction of debts of the decedent. When such notice has been given, the importance of the distinction between proceeding *in rem* and *in personam* disappears: if the notice was by actual service on the parties, they are parties to the record, and as such bound by the judgment of the court; if by publication, then the analogy to the proceeding *in rem* is complete; the title of the administrator is thereby extended over the real estate, and displaces that of the heir or devisee for the purposes pointed out by the law. The judgment affects neither the person nor any other property of the heirs or devisees save that described in the notice published, which may then be said

¹ Says Brewer, J., in delivering the opinion of the United States Supreme Court in *Byers v. McAuley*, 149 U. S. 608, 615: "An administrator appointed by a State court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and cannot be disturbed by any other court."

to be in the custody of the law. But if no notice was given to parties in interest, and the administrator was not in possession of the land, under the law of the State, then the proceeding is necessarily void, being neither *in rem* nor *in personam*.

It is hardly necessary to repeat that the jurisdiction exercised by probate courts in adjudicating upon the rights of litigating parties, is, so far as such parties are present in court or represented by counsel, strictly followed by all the consequences attendant upon adjudications *in personam*, to the extent of the subject-matter over which the court has power.

§ 145. **Method of Procedure in Probate Courts.** — Although probate courts are mostly, if not universally, courts of record, having a seal, a clerk or authority to act as their own clerk, and executive officers, yet their procedure is, generally, summary, requiring no pleading in the technical sense, nor adherence to artificial rules in the statement of the cause of action or defence. An intelligible statement of an existing substantial right, which the court has jurisdiction to enforce, is a sufficient allegation of all matters necessary to sustain a judgment; and the simple appearance of the defendant usually entitles him to rebut the proof offered by the other side, or prove any matter in defence; save, perhaps, a cause of action constituting a set-off or counter claim, of which the other side must have sufficient notice to enable it to prepare any defence it may have to the same.

It lies in the nature of these courts, that in the exercise of their jurisdiction they are not confined to legal principles or the rules of common-law courts, but exercise equitable powers as well. Whenever, within the scope of the statutory jurisdiction confided to them, the relief to be administered, the right to be enforced, or the defence to an action properly pending before them, involves the application of equitable principles, or a proceeding in accordance with the practice in chancery, their powers are commensurate with the necessity demanding their exercise, whether legal or equitable in their nature.

But they possess these powers only in so far as they have been conferred by statute, or are indispensable to the exercise of such as have been conferred. They have no original chancery powers, such as to enforce a vendor's lien, no ancillary juris-

diction in aid of common-law courts, no power to follow a trust fund through various transformations, or to require a fund to be paid into court in advance of distribution, nor to entertain an equitable bill for construction of a will, nor for interpleader, nor over any purely equitable right. The resemblance of probate courts to courts of chancery consists in their practice of proceeding by petition and answer, containing the substance, but not the nice distinctions, of a bill in equity.

Although the right of trial by jury is secured in most States to claimants seeking to establish their claims in probate courts, yet the power, inherent in courts proceeding according to the principles of the common law, to instruct the jury and to direct or set aside a verdict and grant a new trial, does not exist in probate courts unless affirmatively granted by statute.

But the rules of evidence and of property are equally binding upon probate and common-law courts.

CHAPTER XVI.

OF THE SUBJECT-MATTER WITHIN THE JURISDICTION OF
PROBATE COURTS.

§ 146. **Scope of the Jurisdiction.**—Logically, the jurisdiction of probate courts should extend to all matters necessarily involved in the disposition of the estates of deceased persons, from the time of the owner's death until the property has been placed in the possession of those to whom it devolves. We have seen that the English testamentary courts never possessed more than a comparatively small proportion of this power; and it is equally true that in no one of the American States is the whole of it vested in probate courts. Some of the elements of power necessary to the practical realization of the rights of creditors, heirs, legatees, distributees, devisees, and of the husband, widow, and minor children, are found wanting in the statutory grant of powers to these courts in each State, which therefore necessarily lodge in other courts. But the powers so withheld are not the same in all the States; those denied in some are granted in others; so that, while no one probate court possesses them all, yet the full scope of jurisdiction strictly subsumable under the principle which conditions this class of courts will be found in the aggregate of powers conferred upon them in the several States.

It would involve unprofitable labor to enumerate in this place the powers directly conferred by statute, which may be readily found in the enactments of the several States conferring the powers. But it should be mentioned that as to the incidental powers there is considerable divergence in the different States, resulting from the different views taken by the courts upon the extent to which implied powers are involved in the powers granted.

§ 147. **Jurisdiction as limited to the Devolution of Property on the Owner's Death.**—Since the functions of probate courts

are limited, in respect of executors and administrators, to the control of the devolution of property upon the death of its owner, it is not their province to adjudicate upon collateral questions. The right or title of the decedent to property claimed by the executor or administrator against third persons, or by third persons against him, as well as claims of third persons against creditors, heirs, legatees, devisees, or distributees, must, if an adjudication become necessary, be tried in courts of general jurisdiction, unless such jurisdiction be expressly conferred on probate courts.¹ It follows from this principle, that probate courts have no power to investigate the validity of an assignment of the interest of an heir or legatee; the decree of distribution or payment should be to the legal successor of the property, leaving questions of disputed rights between these and claimants against them to be adjudicated in the ordinary courts. And this is so of the assignments of creditors, of legatees, of distributees. But it must not be inferred from this that the probate court has no authority to decree payment to an assignee whose right is not disputed, or where the distributee is estopped by a release; for the decree in favor of the assignee, assented to by the assignor, is of the same effect as a decree in favor of the assignor. Neither has the probate court jurisdiction in actions where personal property is seized or claimed by the executor or administrator as a part of the estate, and claimed by others by title paramount to the deceased. So the probate court has no jurisdiction of questions between trustee and beneficiary, or to compel an accounting between a testamentary trustee and the *cestui que trust*. The jurisdiction of the probate court ceases, when an executor, who is also trustee, has made his final settlement; a court of equity alone can enforce the testamentary trusts; but until distribution he holds as executor, and not as trustee, and equity has no jurisdiction.²

§ 148. **Liabilities arising from Administration.** — Upon the same principle, probate courts have no jurisdiction to decree payment to persons employed by the executor or administrator to render services for him, or for the estate, in its administration. Although it may be the duty of the court, in passing upon

¹ Weerner on Administration, § 151.

² *Ibid.*

the administration account, to determine the reasonableness of payments for such services, and allow or reject the credits taken therefor, it has not the power, unless expressly granted by statute, to adjudicate upon the claims of such persons against the administrator; their remedy, if he refuse to pay, is in another court. Debts created after the death of the intestate or testator cannot be proved in the probate court; nor can the probate court adjust the rights or equities arising out of the sale of real estate, or out of the vacation of the sale, between the purchaser and administrator; nor between coadministrators as to the commissions allowed them in gross, unless the power is conferred by statute.¹

§ 149. — Adjudication of Claims against the Deceased. — The power to adjudicate upon claims against deceased persons is in most States conferred upon the courts having control over the administration of their estates, either exclusively, or concurrently with other courts; but unless such power is expressly granted, the probate courts cannot exercise it. A discussion of the subject of claims against estates is deferred to a subsequent chapter.

§ 150. Incidental Powers conferred by Necessary Implication. — The necessity of recognizing power in the probate courts to carry out the functions expressly pointed out for them, and to accomplish the express purposes for which they are created, has already been mentioned.

§ 151. Power to construe Wills in Probate Court. — The jurisdiction of probate courts over the estates of deceased persons necessarily includes the power in the first instance to construe wills, whenever such construction is involved in the settlement and distribution of the estate of a testator. It is obvious that distribution cannot be made nor legacies ordered to be paid, unless the rights of legatees are first adjudicated; and such adjudication involves the ascertainment of the testator's intention, in order to fix the rights of legatees in accordance therewith, and whether a bequest is valid or void, or adeemed. It is the decree of distribution that determines the rights of legatees and distributees; hence such order or decree is conclusive as to the rights of heirs, legatees, and devisees

¹ Woerner on Administration, §§ 153 and 356.

subject only to be set aside or modified on appeal.¹ It may be here observed that this power to construe wills is given, however, only to the extent of determining to whom the executor must pay or deliver the funds of the estate in the first instance and does not extend to the determination of questions between legatees themselves, such as whether the legacy is absolute or for life only, or subject to trusts or conditions.

§ 152. **Construing Wills in Equity.** — It may be proper to note in this connection the power of courts of equity in respect of the construction of wills, upon the application of an executor, administrator, or other trustee, or even of a *cestui que trust*, to determine questions of doubt in carrying trusts into effect. The power arises out of the jurisdiction of courts of equity to decree the payment of legacies (because the ecclesiastical courts could neither take the accounts necessary sometimes to ascertain the amount of legacies, nor enforce their decrees), and to entertain bills of interpleader (in cases of conflicting trusts, to save trustees from hazardous responsibility and future litigation, or of conflicting legal claims against one who has no interest in the thing claimed, but is a mere stakeholder). It is deduced from the equity jurisdiction given by statute in cases of trust arising in the settlement of estates, where the trustees are actors and seek the aid and direction of a court of equity in cases of doubt and difficulty, and where conflicting claims are asserted by different parties to the same property or rights under the instrument creating the trust; and is expressly conferred by statute in some of the States. Where equity jurisdiction to construe wills is conferred upon the probate court, it may be applied to for instructions as to the construction of a will; but the power does not reside in such courts unless expressly, or by necessary implication, conferred, and even when it is, the distinction between probate courts proceeding as such, and the same courts when exercising statutory jurisdiction in equity, is a broad one. Thus an executor, administrator c. t. a., or any party claiming against him, may apply to a court of equity to have his rights in the estate ascertained and settled in respect of testamentary trusts which may be valid or invalid;

¹ The effect of the order of distribution will be more fully stated in connection with that subject: *post*, §§ 558-559.

for the executor holds the property in trust for the persons to whom it is legally bequeathed, and for those who are entitled to it under the Statute of Distributions if not effectually disposed of by the will. Where the application is made by an executor in good faith, under circumstances creating a doubt as to the intention of the testator or the rights of legatees or heirs, the costs are payable out of the estate; not so, however, where the proceeding was unnecessary or frivolous, in which case the party causing it must bear the costs.

§ 153. **Exclusive and Concurrent Jurisdiction.** — The jurisdiction exercised by probate courts in the matter of admitting wills to probate, appointing administrators, and taking administration bonds, is exclusive of all other courts or tribunals in all the States. Other matters committed to their jurisdiction are, generally, within their exclusive original jurisdiction, any party interested having, in most States, a right to appeal and have a trial *de novo* in the appellate court. From the nature of the jurisdiction so conferred, it is evidently essential that the adjudications upon the subject-matter, not appealed from or reversed in direct proceeding, shall be final, not only in the courts in which they are pronounced, but in all other courts where the same question arises. Hence a superior court has no power, in the exercise of its chancery jurisdiction, to set aside a will which has been admitted to probate, or to remove an executor, enjoin a will from being probated, or to control an administrator in the discharge of the ordinary duties of his office, while the administration is pending in the probate court, or to subject the lands of heirs to the payment of debts of the ancestor, if the creditors have failed to present their claims for allowance in the probate court; nor to allow and enforce payment of a claim against an estate; nor has a common-law court power to try an action purely probate in its character, having for its object the recognition of heirs, legatees, or distributees, and establishing their rights judicially.

In some States, courts of equity have retained concurrent jurisdiction with probate courts in some respects, chiefly in the matter of compelling executors or administrators to account. The general tendency, however, is to vest exclusive original jurisdiction over executors, administrators, guardians,

curators, etc., in probate courts, arming them with ample powers, both in the extent of their jurisdiction and their mode of procedure, for the accomplishment of those purposes which could not be attained in the English testamentary courts and rendered necessary the interference of equity courts. Hence, in this country, courts of equity do not generally interfere in the administration of estates, except in aid of the probate courts, where the powers of these are inadequate to the purposes of perfect justice, and then for the same reasons which induce them to interfere with the jurisdiction of common-law courts. But where the jurisdiction of the probate court has once properly attached, no other court will interfere or go behind its judgments or decrees, without special and sufficient reasons.¹

§ 154. **Probate Jurisdiction of Federal Courts.** — The jurisdiction of federal courts is conferred upon them by the Constitution of the United States, and the laws of Congress in pursuance thereof; and where the requisites of jurisdiction exist, this jurisdiction cannot be ousted or annulled by statutes of the States, though assuming to confer it exclusively on their own courts. A citizen of another State may, therefore, establish a debt against the estate in a federal court; or a foreign distributee may establish in a federal court his right to a share in the estate, and enforce such adjudication against the administrator personally and his sureties, or against any other parties subject to liability, so long as the possession of the property by the State court (holding through the administrator) is not interfered with. It has even been held that in an exceptional case where assets in an ancillary State are in danger of being lost to creditors because of non-administration resulting from neglect and litigation, preventing protection by the probate court, a Federal court, in the exercise of its chancery jurisdiction, may appoint a temporary receiver pending action by the probate court, in the State where the assets are situated.²

But, as established by the Supreme Court of the United States in an exhaustive opinion delivered by Justice Brewer, the Federal courts have no original jurisdiction with respect to the administration of the estates of deceased persons; they

¹ Woerner on Administration, § 156.

² *Underground v. Owsley*, 176 Fed. (C. C. A.) 26.

cannot draw to themselves, by reason of any of the powers enumerated, the *res*, or administration itself; nor make any decree looking to the mere administration of the estate, nor can they in any way disturb the possession of the decedent's property held by an administrator appointed by a State court, and thus, through him, dispossess that court of its custody.¹ Hence the claims established by a resident of another State in the United States Court cannot be enforced by direct process against the decedent's property, but must take its place and share in the estate as administered in probate court. A non-resident who delays until the period of proving claims fixed by the State statute has expired, the representative's final account passed, and the order of distribution made in the probate court, will be barred from proceeding to have his claim allowed in the Federal court.²

So also it is firmly established that the Federal courts have no jurisdiction to grant original probate or letters. Such proceeding for probate or contest of a will in the testamentary court (including a direct review or continuation thereof by appeal or otherwise) is *in rem*, and, not being between parties, cannot be removed to the Federal court; but yet, where such will may under the State law be contested by original proceedings in a court of general jurisdiction, and becomes an independent action or suit *inter partes* residing in different States, the Federal courts take jurisdiction as they would in any other controversy between the parties.³

After a will has been established in a State court, the Federal courts have jurisdiction to interpret its provisions in an action between citizens of different States. But it is held that where the exercise of federal jurisdiction depends upon diverse citizenship, it must be confined to the administration of the rights of such diversely domiciled citizens, and to them alone.⁴

¹ Byers v. McAuley, 149 U. S. 608.

² Security Trust Co. v. Bank, 187 U. S. 211, 230.

³ Farrell v. O'Brien, 199 U. S. 89, 110.

⁴ Security Co. v. Pratt, 65 Conn. 161.

CHAPTER XVII.

DOMICILIARY AND ANCILLARY JURISDICTION.

§ 155. **Authority of Representatives limited to the State granting it.** — The property of deceased persons is vested by law in representatives who, for the purposes of its devolution, continue the person of the defunct. The authority of these representatives emanates from the law of the State or country under which they hold letters testamentary or of administration; and since it is universally recognized that the laws of every State affect and bind directly all property within its territorial limits and all persons residing therein, whether natural-born citizens, subjects, or aliens; and that a State may, therefore, regulate the manner and circumstances under which property within it, whether real or personal, shall be held, transmitted, and enforced, — it is evident that no one can, in a representative capacity, whether *a testato* or *ab intestato*, meddle or interfere with a succession before probate of the will or grant of administration, or some other formal induction into the property in the forum of the country or State where it is found. This is the necessity of the rule, recognized in England as well as in the Federal and State courts of America, that letters testamentary and of administration have no legal force or effect beyond the territorial limits within which the authority of the State or country granting them is recognized as law.

§ 156. **Administration of Same Succession in Different Countries.** — It follows from this doctrine that where a person dying leaves property in several different jurisdictions, the legal representatives of such person must derive their authority from each of as many sovereignties as may have jurisdiction over the property so left, because the territorial element of the law, or rather of the sovereignty from which the law emanates, permits no other sovereignty to exercise authority over it, and each therefore must itself create the legal ownership necessary in

its devolution. This authority or legal ownership may be, and except in the States in which non-residence disqualifies a person from the office of executor or administrator generally is, conferred upon the same person in several or all of the States in which the deceased person left property; for a testator may appoint the same or different executors in different countries, and it is held that *ex comitate*, and in order to preserve as far as possible the singleness of administration, the person who obtains administration as next of kin in the jurisdiction of the intestate's domicile, or his appointee, is entitled to a similar grant in any other jurisdiction where the deceased has personal estate; but the administration in each State is wholly independent, whether in the hands of the same or of different executors or administrators, in no wise impaired, abridged, or affected by a previous, and *a fortiori* by a subsequent, grant of administration in another State.¹ There is no privity between administrators in different States, although there may be between executors of the same testator in different States,² who, at common law, are said to be in privity as to the creditors.

The administration granted in the State of the domicile of the decedent, is the principal, primary, original, or chief administration, because the law of the domicile governs the distribution of the personal property, whether to heirs, distributees, or legatees; while that granted in any other country is ancillary or auxiliary. Both are local, however, to the jurisdiction in which they are granted, being limited to the chattels having a particular *situs*,³ independent of each other, save that the origin and devolution of the property in each may be the same. It follows from this want of privity that a judgment obtained against one furnishes no cause of action against another, so as to affect assets under the control of the other. Nor will a judgment in favor of a foreign administrator against the debtor of his intestate support an action against the debtor by an administrator in another State. But a question determined by the courts of a sister State, so as to become *res judicata* between

¹ *Brown v. Fletcher*, 210 U. S. 82.

² This is not true in those States, now comprising the larger number, where the authority of the executor is deduced like that of the administrator from his appointment by the court.

³ *Overby v. Gordon*, 177 U. S. 214.

the parties, cannot be reopened by the same parties in another State.¹ Hence, where the domiciliary court, having jurisdiction to construe a will, adjudicates thereon, such adjudication is binding upon the courts of other States; but this doctrine must not be understood as going to the extent of depriving the courts of a State in which lands lie from construing the will as to such realty within its jurisdiction. A decree of distribution obtained in one State cannot be attacked on the ground of fraud and mistake in another State. A judgment on final accounting in one State, or the disallowance of a claim, is a judicial proceeding entitled to full faith and credit in the courts of another State, under the Constitution and acts of Congress. But this constitutional provision does not give a judgment or proceeding any greater force and efficacy than it has in the State where had, nor does it preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction;² and it is held that the bare appointment of an administrator in one State cannot foreclose inquiry into the fact of the domicile of the decedent in the courts of another sovereignty, nor has the Probate Court of one State power to conclusively bind all the world as to the fact of the decedent's domicile there by finding such to be a fact in a proceeding *in rem* in granting letters,³ or admitting wills to probate.

§ 157. **Jurisdiction over Property removed to Another Country after Owner's Death.** — But it may be that the *situs* of property is changed after the death of the owner, and before any administrator reduces it into possession. In such case, since every administration operates on such property of the deceased as is at the time of the grant, or shall be at any time during its existence, within the jurisdiction of the court granting the same, the question determining the jurisdiction is whether there is or is not any vacancy in the legal title to the property where and when found. For if goods are once in the legal possession of an administrator duly appointed, they cannot afterward be

¹ *Carpenter v. Strange*, 141 U. S. 87.

² *Thormann v. Frame*, 170 U. S. 350, 356.

³ *Overby v. Gordon*, 177 U. S. 214.

affected by an administration granted in another jurisdiction to which they may be removed, because there is then no vacancy in the legal ownership; they are, technically, no longer the goods of the deceased, but of the administrator of the jurisdiction from which they were removed. But if the goods have never been in the possession of the administrator, although they be removed from the jurisdiction where he might, but did not, take possession of them, an administrator of the jurisdiction to which they are taken may do so, without regard to priority in the grant of the respective administration. Thus, where stage-coaches and stage-horses belonged to a line running from one State to another, it was said that, if there had been different administrators in the two States, "the property must have been considered as belonging to that administrator who first reduced it into possession within the limits of his own State."¹ So, also, ships and cargoes, and the proceeds thereof, may be situated in a foreign country at the time of the owner's death; but since they proceed according to their usage, on their voyages and return to the home port they are properly taken possession of and administered by the administrator of the *forum domicilii*.²

§ 158. **Legal Status of Foreign Administrators.**—No executor or administrator can, in his official capacity, originate or maintain an action in the courts of any country, save that which has granted him letters testamentary or of administration, without authority from the country in which he brings the action; nor collect rents, or in any manner intermeddle with the property of the deceased in such country. The strict correlative of this proposition is, that no executor or administrator can be subjected to an action, in his official capacity, in the State or country in which he is not recognized as such; nor is he accountable except in the forum from which he obtained his authority, for assets collected in a foreign State by virtue of his office. By the comity of States the authority of domiciliary administrators is recognized in different jurisdictions to a greater or less extent; and it is a matter concerning which the authorities differ, whether an administrator is guilty of laches or negligence in failing to collect assets beyond the jurisdiction of his forum,

¹ *Orcutt v. Orms*, 3 Paige 459, 465.

² See Woerner on Administration, § 159 and authorities.

or obtaining letters in a foreign jurisdiction in which there may be property belonging to the estate. If he collect such property in a foreign jurisdiction without authority, either under his domiciliary letters, or by new letters there obtained, he is liable to be sued in the courts of the foreign State, as one unlawfully intermeddling with the effects, by any creditor or other person interested.¹

§ 159. Validity of Voluntary Payment to Foreign Administrator. — Upon the question of the validity of the voluntary payment of a debt to a foreign executor or administrator, the authorities are not unanimous. The tendency is, however, in the direction of recognizing the validity of such payments, when not conflicting with the home administration. Chancellor Kent so ruled;² and it is so held in many states, and in the Supreme Court of the United States.³ Some decisions limit their sanction to the validity of the payment when made in the decedent's domicile, refusing to decide one way or the other that the payment would have been valid if made to the foreign administrator of the decedent in the debtor's domicile. On the other hand, it is held in other States directly and unqualifiedly that payment to a foreign executor or administrator is void, and no defence to the demand of an administrator duly appointed in the State of the debtor's domicile. On principle, it would seem to result from the limitation of the validity of letters testamentary and of administration to the State or country granting them, that foreign executors and administrators can bind the estate of a decedent to the extent only to which the law under authority of which they act is recognized by the comity of the State in which the property may be found; and such comity may be expressed by act of its legislature, or the decisions of its courts. Hence a voluntary payment to a foreign executor or administrator, unless authorized by such comity, is void, and no defence against the claim of an administrator of the State where the debtor or property is found; but will be good where it does not conflict with such administration.

§ 160. Extra-territorial Validity of Title once vested. — Where

¹ Woerner on Administration, § 160.

² Doolittle v. Lewis, 7 John. Ch. 45, 49.

³ Wilkins v. Ellett, 9 Wall. 740, 742; Wyman v. Halstead, 109 U. S. 654.

the legal title to the intestate's or testator's chattels has been fully vested in the executor or administrator, it is obvious that he may remove them, or follow them into a foreign jurisdiction without forfeiting or losing this ownership, for "the title to personal property duly acquired by the *lex loci rei sitæ* will be deemed valid and be respected as a lawful and perfect title in every other country."¹ Hence he and his assignee or vendee may sue for and recover them in a foreign jurisdiction without a grant of new administration there. Upon this principle, a foreign executor or administrator may maintain an action on a judgment recovered against the debtor in another State, for such suit need not be brought in the representative capacity of the plaintiff, as well as on a contract made by the defendant with the foreign executor or administrator personally. Where the foreign executor can sue upon such a contract he may be sued upon it; the remedy must run to either party or neither.² So an executor may maintain an action for lands devised to him in another State, without qualifying in such State as executor, because in such case he may sue as devisee, and the executor or administrator holding a note indorsed in blank or payable to bearer may sue thereon, as indorsee or owner; and *a fortiori* as payee, where the note is given or payable to him in person; for in such case the full legal title is in the personal representative, and the addition of his official capacity mere description of the person. For the same reason, the assignee of a chose in action assigned by a foreign executor or administrator may maintain an action on the chose transferred, although the assignor could not bring such suit himself, on the ground that the disability of the foreign executor or administrator to sue does not attach to the subject of the action, but to the person of the plaintiff. But this is true only in cases where the title to the chose has fully attached, and may be asserted without trenching upon the authority of the *forum rei sitæ*; where, for instance, the property of an executor or administrator is wrongfully removed into another State, or where such property is removed *after* due administration thereon. In such case the title of the owner is not affected by any question of administration, and is as full

¹ Story Conflict of Laws, § 516.

² Johnson v. Wallis, 112 N. Y. 230, 232.

as that of any owner *sui juris*. In general, however, simple contract debts are *bona notabilia* in the State where the debtor resides, and neither an administrator appointed in a foreign State, nor the assignee of such, can control or release them.

§ 161. **Statutory Authority of Foreign Executors and Administrators.** — Statutory provisions of many of the States enable foreign executors and administrators, under such conditions and restrictions as may be imposed, to assign, transfer, collect, and sue for the property of their testators and intestates found within the jurisdiction of such States.¹ It follows from this authority of foreign executors and administrators, that the Statute of Limitations runs against them just as though they had been appointed in such States. In some of the States the foreign executor or administrator is permitted to act, but must first qualify according to the laws of such State, or file his letters testamentary or of administration in the county where he brings suit. For further detail reference must be had to the statutes.

§ 162. **Liability of Foreign Administrators.** — The principle that executors and administrators are not liable to actions as such in States where they have obtained no letters is not permitted to protect them against the consequences of their own wrong or default. Thus, where an executor or administrator removes the property of the estate in his charge, without having completed the administration, to another State, and fails to obtain new letters of administration there, a court of equity will grant relief to any person whose interest is thereby jeopardized, on the ground that, where a trust fund is in danger of being wasted or misapplied, the court of chancery, on the application of those interested, will interfere to protect the fund from loss. The exercise of this authority is in no way inconsistent with the general principle announced as governing the powers and liabilities of executors and administrators, who, as such, derive their powers from, and are amenable only to, the forum of the State under whose laws they hold their office. They are in such proceeding treated, not in their official capacity which is co-extensive only with the State in which they received their appointment, but as persons who, by withdrawing themselves from the jurisdiction of the court having power over

¹ Woerner on Administration, § 163.

them, are unlawfully in possession of the property which is to be protected, or adjudged to its lawful owner.

It may be stated, however, as a general proposition, that the liability of an administrator for property fraudulently, or without having been fully administered, brought from the State in which he received his appointment to another State, is to the creditors and distributees alone, and does not authorize the grant of letters in the latter State.

§ 163. Procedure governed by the Law of the Forum. — Although the law of the domicile of the decedent governs the devolution of personal property to heirs and legatees, yet it follows from the exclusive authority of each nation over the property and persons within its jurisdiction, that the mode of administration, including the method of proving debts, their right to priority of payment, and the marshalling of assets for this purpose, is governed altogether by the law of the country in which the executor or administrator acts, entirely independent of that in the domicile of the decedent, or in any other State. Thus in *Smith v. Bank* the deceased owed in his domicile, Virginia, on a bond. In Virginia the debt would be preferred. There was ancillary administration in the District of Columbia and there the debt on bond was not a preferred one, but was of equal dignity with general debts. Accordingly the bond was not entitled to preference in administration of the assets in the District.¹

§ 164. Payment of Debts and Distribution to Non-Residents. — From these principles it results that the administration of the assets of a deceased person is conducted according to the laws of the State in which they may be found, and applied first to the payment of the expenses of administration, and such debts as may be proved against the estate by creditors residing there; and if there be legatees or heirs there also, their claims will be determined according to the law of the decedent's domicile, and distributed to them. The residue may then be remitted from the ancillary to the domiciliary executor or administrator. But it is not obligatory upon courts to transfer the assets to the domicile for distribution; in their judicial discretion, to be guided by the circumstances of each particular case, they may

¹ 5 Peters 518.

be thus remitted, or ordered to be distributed by the ancillary administrator to the parties in interest seeking their remedy there.

Where the estate administered on in more than one State or country is fully solvent, the rule referred to is of easy application, and there seems to be no occasion to doubt the correctness of the principle. "For," says Parker, C. J., of the Supreme Judicial Court of Massachusetts, "it would be but an idle show of courtesy to order the proceeds of an estate to be sent to a foreign country, the province of Bengal, for instance, and oblige our citizens to go or send there for their debts, when no possible prejudice could arise to the estate, or those interested in it, by causing them to be paid here; and possibly the same remark may be applicable to legacies payable to legatees living here, unless the circumstances of the estate should require the funds to be sent abroad."¹ But with reference to effects collected by an ancillary administrator of an insolvent estate the question is more difficult. "We cannot think, however," says the same learned judge, "that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. . . . Creditors of all countries have the same right as our citizens to prove their claims and share in the distribution."² But to send the effects of an insolvent estate to the domiciliary administrator, to be there reapportioned among all the creditors according to the laws of the State of the domicile would work equal injustice and greater inconvenience to the creditors in the State of the ancillary administration, "whose debts might not be large enough to bear the expense of proving and collecting them abroad; and in countries where there is no provision for equal distribution, the pursuit of them might be wholly fruitless. As in Great Britain, our citizens, whose debts would generally be upon simple contracts, would be postponed to creditors by judgment,

¹ *Dawes v. Head*, 3 Pick. 128, 144.

² *Ibid.*

bond, etc., and even to other debts upon simple contract which might be preferred by the executor or administrator. It would seem too great a stretch of courtesy to require the effects to be sent home, and our citizens to pursue them under such disadvantages.”¹ To avoid the injustice and inconvenience attendant upon either course, Chief Justice Parker suggested the rule, now adopted by courts in some States and in some enacted by statute, to retain the funds in the State of the ancillary administration for a *pro rata* distribution according to the laws thereof among its citizens, having regard to all the assets in the hands of the principal as well as of the auxiliary administrator, and also to all of the debts which by the laws of either country are payable out of the decedent’s estate, without regard to any preference which may be given to one species of debt over another, considering the funds in each State as applicable, first, to the payment of the just proportion due to its citizens, and, if there be any residue, that should be remitted to the principal administrator, to be dealt with according to the laws of his country.

Non-resident creditors of an insolvent estate may, in some States, prove their claims against the ancillary administration, and subject the real estate of the intestate to their payment, without showing that the personal property of the estate in the State of the domicile has been exhausted. *A fortiori* may resident creditors do this in case of a solvent estate.

§ 165. **Real Estate governed by the Lex Rei Sitae.** — It is a rule conditioned by imperative necessity, that immovable property should be governed, especially in respect of its transmission, by the law of the country in which it is situated. For this reason the execution and probate of a will must conform strictly to the law of the State in which land is therein devised, and this law is also to govern as to the capacity of the testator and the extent of his power to dispose of the property. So the descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognized as legitimate heirs by the laws of that country; and they take in the proportions and in the order which these laws prescribe. All

¹ Dawes v. Head, 3 Pick. 128, 144.

the authorities, both in England and America, so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the country within whose territory it is situate. The reason of the rule includes leasehold and chattel interests in land, servitudes, and easements, and other charges on lands, as mortgages and rents, and trust estates; all of these are deemed to be, in the sense of the law, immovables and governed by the *lex rei sitæ*. And as to what constitutes immovable or real property resort must also be had to the *lex loci rei sitæ*.

PART II.

OF THE OFFICE OF EXECUTORS AND ADMINISTRATORS.

CHAPTER XVIII.

NATURE OF THE TITLE VESTING IN EXECUTORS AND ADMINISTRATORS.

§ 166. **Conduit of the Inheritance.**—In England and the United States the real estate descends to the heirs and devisees, subject to the power of the executor or administrator to convert the same into personalty for the payment of the decedent's debts; the real or personal property set apart for the widow and minor children goes to them absolutely, and the personal property goes to the executor or administrator to be distributed, after payment of debts, to legatees or next of kin. It will now be proper to inquire into the nature and extent of the authority conferred upon the officers employed by the law to give effect to the will of a decedent in respect of his property, and whose function it is to personate the deceased in all matters touching the posthumous disposition of his affairs.

§ 167. **Distinction between Executors and Administrators.**—The functions, powers, liabilities, rights, and duties of executors are in most respects identical with those of administrators. But however great the similarity between the two offices may be, there are some essential distinctions which cannot be ignored or abolished even by legislation, without a change in the law of administration so radical as to be improbable, at least for many years to come.

The decisive difference between them arises out of the method of their appointment; executors represent their testators by virtue of the act of the testator himself, while the authority of the administrator is derived exclusively from the appointment by some competent court. An executor can derive his office from a testamentary appointment only; the administrator, on

the other hand, derives his authority wholly from the probate court; he has none until letters of administration are granted. From this distinction important questions frequently arise with regard to the time when the authority or liability of the one or other originated, which will be more fully considered hereafter.

An important distinction exists also in respect of the power to hold, manage, and alienate the property of the deceased; the authority of the administrator is commensurate with the provisions of the law on the subject, as existing and recognized in the forum of his appointment; but the will of the testator is in itself a law to the executor, which may enlarge or circumscribe the authority or discretion which an administrator would have, and which, to the extent in which it is not repugnant to the law of the State, he must strictly observe.

§ 168. **When the Title vests in the Executor, and when in the Administrator.** — An executor is a person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease. As his interest in the estate of the deceased is derived from the will, it vests, according to the common law, from the moment of the testator's death. The will becomes operative, including the appointment of the executor, not by the probate thereof, nor by the act of the executor in qualifying, which are said to be mere ceremonies of authentication, but by the death of the testator. On the other hand, an administrator is one to whom the goods and effects of a person dying intestate, or without appointing an executor who survives and accepts the office, are committed by the probate court. Deriving his authority wholly from his appointment by the court, his title to the property of the deceased vests in him only from the time of the grant.

In respect of executors, however, the common law has been materially modified in many of the States, and the doctrine that their powers are conferred directly by the will is mostly repudiated. "The fact that one is named in the will as executor does not, as at common law, make him executor in fact, but only gives him the right to become executor upon complying with the conditions required by law."¹ "At death, a man's

¹ *Stagg v. Green*, 47 Mo. 500, 501.

property really passes into the hands of the law for administration, as much when he dies testate as when he dies intestate; except that, in the former case, he fixes the law of its distribution after payment of his debts, and usually appoints the persons who are to execute his will. But even this appointment is only provisional, and requires to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than the will.”¹ Most States announce this doctrine.²

§ 169. **Relation of the Appointment to the Time of Death.** — For particular purposes the letters of administration relate back to the time of the death of the intestate, and vest the property in the administrator from that time. On this principle, an administrator may maintain trespass for injuries to the goods of the intestate committed after his death and before the appointment; or trover for property so wrongfully detained; or an action on a contract made with the defendant before appointment; or for money belonging to the estate collected by defendant before grant of letters; or assumpsit for money paid to defendant’s order. “This doctrine of relation is a fiction of law to prevent injustice, and the occurrence of injuries where otherwise there would be no remedy; and would not be applied in cases where the rights of innocent parties intervened;” nor “to recognize, validate, and bind the estate by the unauthorized acts which have been done to the prejudice of the estate, by any one, while the title was in abeyance;”³ nor to give effect to the Statute of Limitation, which in some States does not run during the period intervening between the death of the intestate and the grant of letters. The principle is applicable, *a fortiori*, to executors in all of the States in which they are required to give bond before induction into office, or where, for any reason, the common-law rule, according to which they derive their authority from the testator, and not from the court, is modified by statute. A conveyance under a power of sale in a will, before probate of such will, by one nominated as executor, will be validated by a subsequent probate of the will.⁴

¹ Schoenberger v. Lancaster, 28 Pa. St. 459, 466.

² Woerner on Administration, § 172.

³ Gilkey v. Hamilton, 22 Mich. 283.

⁴ Woerner on Administration, § 173.

§ 170. **Title of Executors and Administrators in Auter Droit.**— The interest which an executor or administrator has in the estate of the deceased is *in auter droit* merely: he is the minister or dispenser of the goods of the dead. Since the property is not his own, it follows that he may maintain an action therefor *in auter droit*, although he himself be disabled from suing *proprio jure*; and any one claiming the same under a title from him in his private or personal capacity must show that he has ceased to hold it in a representative capacity. If the executor or administrator become bankrupt, having property in possession of his testator or intestate distinguishable from his own, it is not liable to the bankrupt's creditors, though it should be money; nor can the property so distinguishable be seized in execution of a judgment against the executor or administrator in his own right. Since an administrator stands in the relation of trustee to all those interested in the estate, property misapplied by him and converted into other property, or sold and the proceeds thus misapplied can, in his hands, be followed, wherever it can be traced through its transmutations, and will be subject, in its new form, to the rights of those interested in the estate; and proof of substantial identity is sufficient.

§ 171. **Power of Alienation.**— But an executor or administrator has at common law power to dispose of and alien the assets of the decedent; he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased. And he may convert them to his own use, thus making himself chargeable for the amount, and subjecting them thus converted to the same incidents and liabilities, in all respects, as if they had never belonged to the estate of the deceased.¹ But this common-law doctrine, as hereafter shown, is materially modified in America.

¹ Woerner on Administration, § 175.

CHAPTER XIX.

OF SPECIAL AND QUALIFIED ADMINISTRATORS.

§ 172. **Administrators cum Testamento Annexo.**—It has been shown that the chief distinction between an executor and an administrator lies in the source of their appointment, and in the fact that the one disposes of the estate according to the directions of the testator, while the other is governed in this respect by the general law. The distinction is still fainter in cases where a will exists and, from any cause, there is no executor. In such case the probate court designates a person to carry out, or *execute*, the will, which is then annexed to and becomes part of his letters; from which circumstance he is known as administrator (not executor, because not nominated by the testator) *cum testamento annexo*, or administrator with the will annexed. Since it is his duty to dispose of the property of the testator in accordance with the provisions of the will, it is obvious that his powers can differ but slightly from those of an executor.

Since all the duties of an executor, pertaining to his office as such, devolve to the administrator with the will annexed, the latter possesses, generally, the same powers, is bound by the same duties, and subject to the same liabilities as the former, whether appointed originally, or upon the death, removal, or resignation of the executor; but the powers and duties not necessarily connected with the functions of an executor devolve upon the administrator with the will annexed only when it appears clearly from the will that the testator so intended; as where, for instance, he directed an act to be done at all events, without leaving any discretion to the executor.

§ 173. **Administrators de Bonis Non.**—Upon the death, removal, or resignation of a sole executor or administrator, or of all of several joint executors or administrators, before the estate has been fully administered, it becomes necessary to appoint a

successor, to the end that the administration may be completed. Such an officer is known as administrator *de bonis non* (*administratis*), — administrator of the unadministered effects; or, if he succeed an executor or an administrator *eum testamento annexo*, he is known as administrator *de bonis non cum testamento annexo* — administrator with the will annexed of the unadministered goods. At common law there is a distinction in this respect between executors and administrators, growing out of the doctrine that an executor's executor succeeds to the estate of the deceased executor's testator, but not the deceased executor's administrator, nor does a deceased administrator's executor or administrator succeed to the estate of the original intestate. This distinction disappears, of course, with the rule from which it springs, and now exists in very few of the American States; where it is not recognized, the necessity for the appointment of an administrator *de bonis non* is the same, whether it was an executor or administrator who left the estate unadministered. It is to be observed, however, that a successor to an executor provided for in the will by the testator, completes the administration as executor, not as administrator.

An estate is not fully administered so long as anything remains to be done to vest the title of the decedent's estate in the beneficiary, whether creditor, next of kin, legatee, or devisee, which no one but an executor or administrator can lawfully do; such as paying a legacy, or distributing the effects or assets, although the assets had been reduced to money, paying debts, collecting debts, or the like. But it has been held in several cases that, where all that remains to be done is some mere formality, the appointment of the administrator *de bonis non* should be refused.¹

The administration *de bonis non* may be granted after any length of time, but lapse of time and other circumstances may raise a presumption that all debts against an estate are barred or paid, and that the remaining assets belong to the heirs, in

¹ Thus where an asset supposed to be valueless acquired value after final settlement, it was held that the distributees of the estate could sue for it; and that an administrator *de bonis non* should not be appointed. *Jordan v. Hunnel*, 96 Iowa 334; but *contra*: *Mallory's Appeal*, 62 Conn. 218.

which case the administration cannot be reopened by the appointment of an administrator *de bonis non*. If nothing remains to be done to complete administration, the grant of letters *de bonis non* is merely nugatory.

Since there can be but one valid administration in the same State of the same succession at the same time, the appointment of an administrator *de bonis non* before the death, removal, or resignation of the executor or original administrator is a nullity.

§ 174. **Public Administrators.** — Where no person is entitled to administer on the estate of a deceased person, in the jurisdiction; or where those so entitled for any reason decline to act, the State must supply some person whose duty it is to conduct such administration. In some States some official, for instance the sheriff, is charged with this duty *ex officio*. In most a special officer is elected or appointed to whom the name of Public Administrator is usually given. The general scope of his duty is to administer on estates otherwise without administration. But States vary widely in fixing the kinds of estates on which this official must administer, in determining the method of his taking charge, in determining his relations to his successor in office, and many similar questions. These matters depend on the local statutes, and cannot here be pursued in detail.

§ 175. **Administrators Pendente Lite.** — The authority of testamentary courts to grant administration *pendente lite* — during a controversy concerning the right to the administration — seems to have always been admitted; and since the case of *Walker v. Woolaston*,¹ the power of the court to grant administration *pendente lite* in cases touching an executorship also has been settled. The safety of the estate requires that some person be charged with the duty and armed with the necessary authority to protect and preserve it until the termination of the contest touching the administration or executorship shall place it in the charge of the permanent administrator or executor; hence they are also known as administrators *ad colligendum*, and the general duties of such an administrator have been described as being simply to represent the estate during the pendency of the litigation and to see that no detriment comes to the goods

¹ 2 P. Wms. 576.

or effects of the estate, and administrators *pendente lite* compared to receivers in chancery. Their authority ceases, of course, upon the termination of the contest, and they must then surrender the estate into the hands of the rightful representative. But until such termination of their office they may maintain suits for debts due the deceased, and bring ejectment for leasehold estates against the heirs, next of kin, or any other person who may be in possession or pay the widow's award. Whatever they may lawfully do is binding upon the estate. In the absence of statutory authority, they have no power other than may be necessary to collect the effects.

§ 176. **Temporary and Limited Administration.** — Special administrators, known as administrators *ad litem*, are sometimes appointed for the sole purpose of defending or prosecuting particular suits instituted by or against a person who may die while such suit is pending; or where a pressing necessity is shown for carrying on proceedings in chancery, and there is no general personal representative; or where the interest of the general administrator or executor conflicts with that of the estate. In several States the administrator *ad litem* is well known for the last-named purpose, that is, to defend the estate when the administrator or executor has a claim against the estate to present in court. Of course such administrator *ad litem* has no control over assets of the estate; nor indeed any powers or duties beyond those of the litigation.

There are other temporary administrations known to the common law, and of importance in England, which are not so important in America, because the theory of administration differs in the two countries in some important particulars, chief among which is the time during which the authority of personal representatives continues. In England the administration extends, in general, to the whole personal estate of the deceased, and terminates only with the life of the grantee; while the authority of limited administrators is confined to a particular extent of time, or to a specified subject-matter. At the common law, too, executors, and at one period of time administrators, possessed an interest in the *residuum* of the estates in their charge which has rarely or never been recognized in the United States. It is the policy in this country, declared

and emphasized by the statutes of the several States, echoed by the courts, and warmly approved by the people, to reduce the time allowed executors and administrators to close up their administrations to the briefest period compatible with justice to creditors.

So at common law, as also under the statutes of some States, when the person named as executor is a minor, administration will be granted until the minor attains majority, to a temporary administrator, designated as *durante minore ætate*. And at common law an administrator *durante absentia* could be appointed in the absence from the country of the person entitled to administer. Such an administrator does not exist in America. Prolonged absence in America would be cause for removal; or if the party absent had never qualified, for forfeiture, and consequent appointment of a regular permanent administrator.

TITLE THREE.

OF THE DEVOLUTION TO THE LEGAL REPRESENTATIVES.

PART I.

OF THE ESTATE WITHOUT OFFICIAL REPRESENTATION.

CHAPTER XX.

WHAT MAY BE DONE BEFORE PROBATE OR GRANT OF LETTERS.

§ 177. **To whom the Real and to whom the Personal Property descends.** — Upon the death of an owner of property his real estate descends, at common law, to his heirs or devisees, subject, under a series of English statutes, to be converted into assets for the payment of the owner's debts, if the personalty be insufficient for that purpose. This liability, however, does not deflect the course of descent: the personal representative possesses only the naked power to sell or lease the real estate, if it become necessary, to pay debts, and until this power is executed, by order of the court having jurisdiction, the title and its defence, the possession, rents, and profits, belong to the heirs and devisees. The title of the heir or devisee vests instantly upon the death of the ancestor or testator; and when the executor or administrator sells, the sale does not relate back to the death of the deceased, but takes effect from the time when made. The law is substantially the same in most of the American States, although some of them have abolished the artificial common-law rule distinguishing, in this respect, between real and personal estate, and subject both classes of property alike to the title of personal representatives for the

purpose of administration. These exceptions will be more conveniently noted in connection with the subject of the liability of real estate for the debts of its deceased owner.

The personal estate of a decedent, however, passes, as at common law, so in all the States (with the exception, in some particulars, of Louisiana), to the executor or administrator.

We have already seen, however, that as to the time when the personal estate vests in the representatives there is, at common law, a broad distinction between executors and administrators. It results from the English doctrine ascribing the executor's authority to the will itself, of which the probate is but the authenticated evidence, that the property of the deceased vests in the executor from the moment of the testator's death; while the administrator, whose sole source of authority is the appointment by the probate court, can have no power to act before the grant of letters.

§ 178. **Authority of Executors before Grant of Letters Testamentary.** — In most of the American States executors are required to qualify by giving bond and taking the oath of office; until they have complied with these conditions they have no legal power to act, except decently to bury the deceased and to do what may be necessary to preserve the estate. Where the statute authorizes the executor to act without bond, the grant of letters testamentary by the probate court is the source of his authority, which does not depend for its validity upon the manual issuance of the letters. Hence the sale or transfer of property by an executor who has not qualified is void, and his assent to a specific legacy does not pass the legal title to the thing bequeathed. It has also been held that an executor before probate, if legally competent to qualify, may be treated as representing his estate so far as relates to acts in which he is merely passive, such as receiving notice to an indorser of the dishonor of a note.

§ 179. **Authority of Administrators before Grant of Letters.** — It is, of course, inaccurate to predicate any authority of an administrator who is shown by the statement not to be an administrator; the phrase is employed to designate those persons who, having a legal preference or exclusive right to the appointment as administrator, act for the protection and in

the interest of the estate in anticipation of such appointment. The principle upon which the acts of an executor are validated upon subsequent probate of the will or grant of letters testamentary is extended to administrators, and has been enlarged upon in an earlier chapter treating of the nature of the title of executors and administrators. The decisive test to ascertain whether the acts done before appointment are legalized or ratified by the subsequent grant of administration is whether such acts would have been valid had he been the rightful administrator; the consequences both to the person acting and to the estate must be the same as if he had been legally in charge of the estate. The doctrine is stated to be, that the title to the personal property of a decedent is in abeyance until his executor qualifies, or an administrator is appointed, when it vests in him by relation from the time of the death. It has already been pointed out, that this doctrine is a fiction of the law to prevent injustice and injuries to estates, and will never be resorted to where it might unjustly affect the rights of innocent parties intervening, or to recognize or validate unauthorized acts in prejudice of the estate.

CHAPTER XXI.

OF EXECUTORS DE SON TORT.

§ 180. **Extent of Doctrine of Executor de son Tort in America.** —

The common-law doctrine ascribing to an executor authority to act without first qualifying, or going through any ceremony of authentication or induction into office whatever, which might serve as notice to the public of his official character, has given rise in the English law to what Mr. Schouler terms "an official name to an unofficial character; styling as executor *de son tort* — executor in his own wrong — whoever should officiously intermeddle with the personal property or affairs of a deceased person, having received no appointment thereto." ¹ The theory of holding an intermeddler liable in the character which he has himself voluntarily assumed, is not unjust to him, and may be necessary to the protection of the interests of creditors, heirs and legatees of the deceased person, not only because strangers may naturally conclude that the person so acting has a will which he has not yet proved, but for the substantial reason that, by holding him liable in the assumed character, the remedy of parties injured is, at least at common law, much simplified, and circuity of action avoided.

Distinguished American writers on this subject have expressed their disapprobation of the doctrine of liability as executor *de son tort* in strong terms, and intimate that it meets with little favor in American courts. There can be no doubt that in many of the American States, in which the common-law system of the administration of the estates of deceased persons has been entirely done away with, this doctrine should disappear with the conditions which called it into being. There is neither occasion nor room for it in those States which have vested complete jurisdiction in probate courts to control the settlement of estates of deceased persons. It is quite apparent that in such States it would be irrational to apply the doctrine

¹ Schouler on Executors, § 184.

of executor *de son tort* to one who unlawfully appropriates the property left by a deceased person, and thereby renders himself liable as a wrongdoer to the one upon whom the law casts the title: which, by relation, attaches to him from the time of the decedent's death. No one's interest would be subverted.

The office of executor *de son tort* is accordingly abolished in New York, and declared by the courts of Arkansas, California, Kansas, Missouri, Ohio, Oregon, and Texas, and perhaps others, to be repugnant to the letter and spirit of the law of these States. In other States, whose administration laws present the same or similar features as those above mentioned, neither the legislature nor courts have abolished the doctrine, at least not in express terms; but it is gradually passing out of notice, for the reason that it meets no practical want.

In those States, however, in which the common-law mode of administration is still more or less adhered to, — where, for instance, the executor has power to act before qualifying, and even before probate of the will, where he may pay debts not proved before a court or without order of the court, where he is not required to give bond, etc., — the doctrine of executor *de son tort* is a natural and essential element of their law.

§ 181. **Executor de son Tort — how constituted.** — “If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or, more usually, an executor *de son tort*.”¹

Very slight circumstances of intermeddling with the goods of a deceased person will make one liable as executor *de son tort*. Mr. Williams alludes to some ancient cases in which the milking of a cow by the widow, taking a dog, a bedstead, a Bible, were held sufficient, as *indicia* of being the representative of the deceased. But there are many acts which a stranger may perform without incurring the hazard of making himself liable as executor *de son tort*; notably, all acts or offices of mere kindness and charity, and looking to the preservation of the property.

¹ Williams on Executors [257].

§ 182. **The Liability of the Executor de son Tort.** — An executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor. He is liable to be sued by the rightful executor or administrator, by a creditor, or by a legatee; but not, it seems, to the next of kin, so long as any debts remain unpaid, though otherwise where there are no debts owing.

The liability of an executor *de son tort* to creditors of the deceased does not, at common law, extend beyond the goods which he has administered; for while he is not allowed, by his own wrongful act, to acquire any benefit, yet he is protected, if he pleads properly, for all acts other than those for his own advantage, which a rightful executor might do.

The liability of an executor *de son tort* at the suit of a rightful executor or administrator is necessarily different from that to a creditor, for this among perhaps other reasons, that the intermeddling with the assets of an estate under legal administration involves an element of wrong not included in the intermeddling when there is no lawful representative; *viz.* the infringement of the rights of the executor or administrator. Hence to an action by the rightful executor or administrator the executor *de son tort* cannot plead in bar the payment of debts, etc., to the value of the assets, or that he has given the goods in satisfaction of the debts. He may prove, however, under the general issue, in mitigation of damages, payments made by him in the rightful course of administration, because it is no detriment to the administrator *de jure* that such payments were made by the executor *de son tort*.

§ 183. **Effect of Appointment of Executor de son Tort upon his Previous Acts.** — It has already been mentioned, that the grant of letters to an executor or administrator relates back, so as to legalize all previous acts within the authority and scope of a rightful representative. This doctrine is obviously applicable to the acts of executors *de son tort* who may subsequently obtain a grant of letters; for the executor who was not qualified to act, and the person who had not been appointed administrator, were equally executors *de son tort* if they intermeddled. The intermediate acts, which were tortious or unlawful for the want of competent authority before appointment, become, by

relation, lawful acts of administration, for which the actor must account; the liability to account involves a validity in his acts which is a protection to those who have dealt with him.

It would seem to result from the doctrine holding the lawful acts of an executor *de son tort* to be good, that the alienation of goods by him for the payment of debts is indefeasible.

CHAPTER XXII.

OF THE NECESSITY OF OFFICIAL ADMINISTRATION.

§ 184. **Why Administration is Necessary.** — The necessity of official administration, that is to say, of obtaining a grant of letters testamentary or of administration, as the case may be, and the judicial sanction of payment of debts and legacies out of the estate and the distribution of the residue, arises out of the common-law doctrine that the personal property of a decedent descends to the executor or administrator, while his real estate descends to the devisees or heirs, subject, under English and American statutes, to the payment of his debts and legacies. This doctrine is recognized substantially in all the States, except Louisiana, where, under circumstances pointed out by law, the title to personal as well as real property descends directly to the natural or instituted heirs. The direct consequence of this principle of the law is, that without due course of administration the claims of creditors cannot be lawfully satisfied, and neither heirs nor legatees can obtain a legal title to their legacies or distributive shares; and that neither devisees nor heirs can hold the real estate to which they succeed free from the claims of creditors of the deceased, against whom limitation does not, in some States, run after the debtor's death, until there be lawful administration of his estate. Another consequence is, that the payment of debts to the deceased can be coerced by no one but the lawfully appointed executor or administrator, even in equity, because there is no privity between the debtors and any person other than the legal representative.

§ 185. **Administration not Necessary under Certain Circumstances in Some States.** — Apart from specific statutes, the rulings of most States dispense with administration where it is unnecessary. The right of creditors to the assets of a deceased person is usually the principal reason for requiring official administration, and courts, therefore, sanction the disposition of

the property of a decedent without the appointment of an administrator where it is certain that no debts are owing. Thus, upon the death of an infant intestate, administration is held unnecessary, because an infant is presumed not to have incurred any liability; but that presumption is rebutted where he was married and leaves a widow, and of course when the actual existence of debts can be shown. More broadly, "a court of equity will dispense with an administration, and decree distribution directly, when it affirmatively appears that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as 'a useless ceremony.'" ¹ This rule is recognized in decisions of numerous States.² It is, however, difficult to perceive how it can be determined as a matter of law that there are no debts which can be proved against a decedent's estate, before the period allowed for proving claims has expired.

There are also statutes in many States legally dispensing with administration under certain circumstances. In one class of these statutes it is provided that when the person nominated in the will as executor is also the residuary legatee, he may, at his option, instead of the regular administration bond required of executors, give bond with sufficient sureties conditioned that he will pay the testator's debts and legacies (including, either expressly or by implication, funeral expenses and the allowances to the widow and children), and will then be relieved from the necessity of returning an inventory, or further accounting in the probate court. An executor giving such bond at once becomes liable for all of the debts of the testator, but the liability of the estate is not extinguished; and it operates as an admission of sufficient assets and a guarantee to pay all debts, since the executor files no inventory of assets, the only means from which it could be ascertained whether they equal the debts and legacies.

Provision is made by statute in some of the States that, where the property of an estate does not exceed in value the amount which is secured to the widow or minor orphans for their immediate support, the probate court may dispense with adminis-

¹ *Fretwell v. McLemore*, 52 Ala. 124.

² See *Woerner on Administration*, § 201.

tration, and authorize the widow, or minor children by next friend, to collect and appropriate to their own use all such property. The soundness of the principle upon which such provisions rest, or rather the absurdity of a contrary view, is self-evident. Why should the law compel administration where there is nothing to administer? The appointment of an administrator in such case could have no possible effect but to diminish or eat up what the law intends for the support of widows and orphans.

The descent of property is not governed by the same rule in Louisiana as in the other States, but is modelled after the law prevalent on the continent of Europe. That law differs so radically in its fundamental standpoint from the system prevalent in the other States, that it cannot be fairly stated without a treatise extending beyond the permissible limits of this treatise. To avoid repetition, it may here be said of the doctrines laid down in this book, that they do not necessarily apply in Louisiana.

PART II.

OF THE INDUCTION TO THE OFFICE OF EXECUTOR AND ADMINISTRATOR.

CHAPTER XXIII.

OF THE PRELIMINARIES TO THE GRANT OF LETTERS TESTAMENTARY AND OF ADMINISTRATION.

§ 186. **Local Jurisdiction to grant Letters Testamentary and of Administration.** — Whatever may have been the law in ancient times, it is certain that at the time of the passing of the Court of Probate Act, the ecclesiastical court was, in England, the only court in which the validity of wills of personalty, or of any testamentary paper whatever relating to personalty, could be established or disputed, except certain courts baron. In the United States this jurisdiction, and the power to appoint executors and administrators, are vested in probate courts, or courts having probate powers, by whatever name known.

The rule in America is universal, that administration may be granted in any State or Territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased;¹ and that probate of the will of any deceased person may be granted in any State where he leaves personal or real property.

As between the several courts within the same State or sovereignty, jurisdiction attaches primarily to that tribunal which is invested with probate powers for the county or territorial district which includes the domicile of the testator or intestate at the time of his death, without regard to the place of his death or *situs* of his property.

¹ *Thormann v. Frame*, 176 U. S. 350, 355. See *Woerner on Administration*, § 204.

To grant letters on the estate of a deceased person the probate court must find as a fact, and thus judicially determine, that the deceased had his domicile in the county or territorial district over which the jurisdiction of the court extends, for otherwise the court would have no jurisdiction to grant letters, or take probate of a will. It was formerly held in many States, that notwithstanding this finding and adjudication by the court, proof might be made in a collateral proceeding showing that such finding and adjudication was erroneous, and that as a matter of fact the decedent was at the time of his death domiciled in a different county; and that in such case the grant of letters, was void *ab initio* for the want of jurisdiction. But the more reasonable doctrine is gaining ground, and is now held in nearly all the States, that letters so granted, while they are voidable when properly assailed, are valid until revoked in a direct proceeding.

If the deceased had, at the time of his death, no fixed place of residence, letters may be granted in the county where he died; or if he died abroad, in any county where his property may be found; and if he left property in more than one county, then in any of them.

It is obvious, however, that there can be but one grant of administration on the same estate at one time in the same sovereignty or State; and since the jurisdiction which has once attached remains until final completion of the administration, the court first exercising jurisdiction will retain it to the exclusion of every other court in the State.

§ 187. **Jurisdiction over Estates of Deceased Non-Residents.** — No administration can be granted in the case of a deceased non-resident unless he left property within the jurisdiction of the court making the appointment.

The *situs* of real estate confers jurisdiction to take probate of a will affecting it. And although realty goes to the devisee or heir, and the Probate Court in the process of administration has nothing to do with realty unless it becomes necessary to sell land for payment of debts, yet since the existence of debts can only be ascertained in due course of administration, and the title to the realty can generally only be cleared by administration, the fact that there is real estate belonging to the estate

and within the jurisdiction, is in this sense property which will support the grant of letters testamentary or of administration by the proper probate court, although it may develop that there are no debts and no personal property.¹

The *situs* of personalty as conferring jurisdiction presents a matter of conflict, apparent rather than real. The term *bona notabilia*, which was originally used in England to designate the assets of the deceased which were sufficient to draw jurisdiction from the Bishop's Court to the Archbishop's, is now applied to cover such property as confers local jurisdiction for administration. Clearly each sovereignty has the right to determine for itself what are *bona notabilia*, and cannot be directly controlled in its decisions by any other sovereignty. But in the interests of an orderly administration according to principles of universal justice and for avoidance of unseemly conflicts, certain principles are recognized in all jurisdictions by comity. As regards goods and chattels of the deceased, the principle is universally recognized that they are assets in the jurisdiction where they are physically situated at the decedent's death.

As to choses in action the general doctrine is that judgments are *bona notabilia* where the record is; specialties where they are at the time of the creditor's decease; and simple contract debts where the debtor resides. But since the doctrine rests on comity, the sovereignty is under no legal compulsion to follow it; and can and will set the rule aside, whenever substantial justice, the interest of its citizens, or the policy of the State is sufficiently important to warrant such a departure.

That the general principle will not be followed when justice requires a departure is illustrated by the case of *Miller v. Hoover*.² A judgment was rendered in Virginia, and after the

¹ It is to be remembered, of course, as stated in the preceding section, that within the respective counties of the State, the letters must be granted by the probate court of the county where the decedent died domiciled, which is of force throughout the State, and that there can be but one such grant of letters within the same State, though the real estate may be situated in another county, and there is no personalty or other property in the county of the domicile. It is only as to a non-resident of the State that the existence of property confers jurisdiction without reference to the domicile.

² 121 Mo. App. 568.

judgment creditor's death, and grant of administration on his estate in his Virginia domicile, the judgment debtor moved to Missouri. Administration was granted in the latter State on the judgment creditor's estate, though the only claim for an asset there was this judgment rendered in Virginia; a claim which of course was an asset in Virginia at the time administration was granted on the creditor's estate, the debtor then living there. No other remedy was practicable.

The doctrine that specialties are *bona notabilia* in the jurisdiction where they may be physically found at the decedent's death, though it has ample authority back of it, is not of universal reception.

In cases of stock certificates it has been held that the certificates are merely the evidence of the property right, hence stock is *bona notabilia* at the home of the corporation, and not where the certificates were found.¹ Again it has been held in the case of insurance policies that while they are *bona notabilia* in the home State of the insuring company, yet they are also such in the State where the policy — the document itself — is located and where the defendant corporation can be served; and that when jurisdiction has been taken under the latter theory, the State of the home office should decline jurisdiction through comity.²

§ 188. **Claims for Injury resulting in Death as Asset.** — In transitory torts which survive, the residence of the defendant confers jurisdiction.

Some conflict arises in the decisions under the so-called Lord Campbell Acts, existing in every State, whereby an action is given for death occasioned by neglect or default, in contravention of the common law. When the action is given by the statute to the administrator for the sole benefit of the estate of the deceased, there should be no question that the cause of action given by the law of the State where the injury occurred (if it has any extra-territorial force) should constitute *bona notabilia* in a State where the defendant resides, so that adminis-

¹ Richardson v. Busch, 198 Mo. 174; Jellenck v. Huron Copper Co., 177 U. S. 1.

² Sulz v. Ins. Ass'n, 145 N. Y. 563; New England Co. v. Woodworth, 111 U. S. 138.

tration can be taken out in the latter State on the strength thereof. Where the statute of the State where the injury occurred vests the cause of action in the widow or children of the deceased for their benefit, and not for the benefit of the estate, the death loss is clearly not *bona notabilia*, and no administration on the estate of the deceased in another State can be based thereon. But it is very common for the statute to vest the cause of action in the administrator, not for the estate, and he then sues rather in the nature of a trustee for the exclusive benefit of the family of the deceased. Technically such a claim for the benefit of widow and children, not being assets, would seem not to be *bona notabilia* in another State, even though the administrator be the only plaintiff provided by statute; and there are holdings to that effect. But a different conclusion is reached in other States, where "the fact that the statute gives such a right of action to the personal representative and to him alone, implies the right to appoint, if necessary, an administrator to enforce it,"¹ and "where there is property or a fund or right of action which cannot otherwise be made available, it is competent for the Probate Court to appoint an administrator for the sole purpose of collecting and receiving assets which will not be assets of the estate of his intestate or liable for his debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto."² In such case it is for the Probate Court to determine whether there is an apparent claim, a *bona fide* intention to pursue it, and that administration is necessary for its pursuit.

So far as the proceeds of action for death are concerned, as we shall hereafter see, they do not constitute assets in the ordinary sense of the term.³

§ 189. **What constitutes Domicile or Residence.**—It is not always easy to prove what was the domicile or place of residence of a person at the time of his death, so as to fix the jurisdiction over his estate in the proper forum. It has been defined as being, in the common-law sense, the place where one has his true, fixed, and permanent home and principal establishment, to which whenever he is absent he has the intention of return-

¹ *Hutchins v. St. Paul R. R.*, 44 Minn. 5.

² *Sargent v. Sargent*, 168 Mass. 420, 424.

³ *Post*, § 284.

ing. When once acquired, it continues until by free choice another is substituted therefor. Hence there can be no abandonment or acquisition of a domicile by one who is adjudicated of unsound mind, or by one not *sui juris*; the domicile of the child follows that of its parents, and the domicile of the wife follows that of her husband. Absence from the domicile, and residence elsewhere for reasons of health, comfort, business, recreation, temporary convenience, and the like, do not constitute or indicate an abandonment of the domicile. To work a change of domicile, there must be a concurrence of *the intention* to acquire a new domicile with *the fact* of having acquired one and abandoned the former one, without the intention of returning thereto.¹

§ 190. **Proof of Death.** — The death of the testator whose will is to be proved, or of the intestate whose estate is asked to be subjected to administration, is a question of fact of which proof must be made before the jurisdiction of the court attaches. Ordinarily, the death of a person leaving property for administration is a matter of such notoriety that proof is of easy access among the neighbors, relatives, and persons interested in the estate. But where the testator or intestate was domiciled abroad, or died away from home in a remote country, direct proof is not always attainable; and death must in such cases be established by circumstantial evidence, the most usual of which is such person's prolonged and unexplained absence from home without being heard from. When such absence from home has continued for above seven years, within which time no intelligence of his existence has reached his relatives, friends, or acquaintances, it will be presumed that he is dead, and proof of these circumstances, un rebutted, will support the adjudication of the probate court necessary to give it jurisdiction. This presumption does not, obviously, attach to any particular time within the seven years, but in the absence of facts indicating the time of death, assumes the absentee to have lived through the whole period.

Death may also be inferred from the absence of a person from his home, without being heard from for a period less than seven years, if proof be made of other circumstances tending to show

¹ Woerner on Administration, § 206.

his death. Thus, evidence of one's long absence without communicating with his friends, of character and habits making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment, was held sufficient to support the presumption of death.

The *factum* of death may, it seems, be proved by hearsay evidence; "for, as has been said, that a person has been missing at a particular time, accompanied with a report and general belief of his death, must be, in many cases, not only the best but the only evidence which can be supposed to exist of his death." It is so held by the Supreme Court of the United States and in several of the State courts.

The civil law entertains presumptions, based on age and sex, of survivorship among different persons perishing in the same event, who would inherit from each other. The doctrine in England, as stated in the syllabus of *Wing v. Angrave*,¹ is as follows: "there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause; . . . nor is there any presumption of law that all died at the same time; . . . the question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative." The same doctrine, of non-presumption of survivorship, prevails in America. One claiming through a survivorship must prove the survivorship; hence in the absence of evidence from which the contrary may be inferred all may be considered to have perished at the same moment, not because the fact is presumed, but because, from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory, and descent and distribution take the same course as if the deaths had been simultaneous.²

§ 191. **Administration on the Estates of Living Persons.** — The court may be in error in finding that a man is dead, and administer on his estate. Are acts under such an administration valid against the man who returns to assert his rights?

¹ 8 H. L. 183.

² *Young Women's Christian Home v. French*, 187 U. S. 401.

It is agreed, as a general proposition, that the finding of a court as to jurisdictional facts is not open to collateral attack; and its application to the case where a probate court assumes jurisdiction of the estate of a deceased person which properly belongs to another probate court within the sovereignty is discussed *ante*, § 186.

In Woerner on Administration, § 211 of the First Edition, a powerful argument is made for applying the same principle to the case of a person erroneously pronounced dead by the probate court.

But the question, as our author admits, is authoritatively settled by a series of decisions in the State courts and the United States Supreme Court. Such proceedings are held void against the person erroneously declared dead. The jurisdiction is said to depend on the fact of death. Such a proceeding, it is held, would deprive a person of property without due process of law.¹

§ 192. **Administration on Estates of Absent Persons.** — Administration of property becomes necessary, as we have seen, when its owner is, for any reason, incapable of exercising control over the same, — of asserting his *jus disponendum*. The practical reason which demands the interposition of the State is fully as strong when the owner of personal property — or of real property liable for his debts, or for the support of his family — has voluntarily or by compulsion absented himself, so that it is beyond his power to provide for his family or satisfy his creditors, as if he were dead, insane, or a minor. But, apart from statutes, the law does not provide for administration, through the probate court, of the estates of absent persons. Several States provide by statute for such administration on the estates of absent persons. Where such statutes are reasonable as to the period of absence necessary to create the presumption of death, and provide proper safeguards for the protection of his interests in case the absentee should return, they do not violate the due process clause of the Federal Constitution; and their validity seems to be established by the great weight of authority.²

¹ *Scott v. McNeal*, 154 U. S. 34.

² *Cunnius v. School District*, 198 U. S. 458, disapproving two State decisions to the contrary.

CHAPTER XXIV.

OF THE PROBATE OF THE WILL.

§ 193. **Necessity for Probate.** — A will takes its legal validity from its probate; that is, the certification by the court or tribunal clothed with authority for such purpose that it has been executed, published, and attested as required by law, and that the testator was of sound and disposing mind. Without such proof it is not a will in the legal sense.

The will may dispose of real estate, or of personal property, and in a few States different proof or a difference in the procedure to obtain the probate may be necessary as to the one or the other; or it may not affect property at all, but only appoint a guardian for a minor and still require probate to give it validity.

§ 194. **Validity of Probate in Probate Courts.** — Previous to the act creating the Court of Probates, no will or testamentary paper whatever relating to personalty could be established or disputed in any other than the ecclesiastical or prescriptive manorial courts of England; these courts, however, had no jurisdiction over wills affecting real estate, — their sentences and decrees were wholly inoperative as to such. Under the act referred to, jurisdiction to take probate of wills, without distinguishing between them on the ground of their disposing of real or personal property, is vested in the Court of Probate thereby created. This power had long before been exercised by the probate courts of nearly all the States; the distinction between wills of realty and of personalty is now practically ignored in the proceedings to obtain probate, except, perhaps, in Maryland and District of Columbia, where a will of personalty may be admitted to probate in the Orphan's Court, and on the testimony of one of the attesting witnesses, while a will of real estate must be proved by the testimony of all of them. In some of the States, however, there is still a distinction observed as to the conclusiveness of such probate.

§ 195. **Production of the Will for Probate.** — In many States

the judge of probate or register of wills is, by statute, made the custodian of wills deposited with him to that end. In such States, it is his duty, as soon as he receives information of the death of any testator whose will he has in custody, to institute proceedings for the probate thereof, and to that end compel the attendance of the necessary witnesses to prove its execution and the death of the testator. If the judge of probate is not the custodian, or, being so, neglects to proceed with the probate, it is the duty of the executor nominated in the will, as well as of any other person who may have it in possession, to produce it for probate. The time fixed by law for such production is different in the different States, varying from the time when the custodian shall learn the testator's death, to ten days, fifteen days, thirty days, or three months, after the day on which he died. Any person interested in a will may demand its production and probate.

In most of the States the secreting, withholding, or refusal to produce a will for probate, in the possession of the executor or other person, is a violation of the law subjecting such persons to various penalties.

In regard to the time within which a will is *allowed* to be proved, there is considerable divergence in the several States, depending on their statutes. Thus in Maine, Oregon, and Tennessee no probate can be granted after the expiration of twenty years from the testator's death. Again, in Indiana, New York, and Ohio *bona fide* purchasers from heirs can hold against devisees if the will has not been produced within a limited period. From a case in Kentucky it would appear that the general Statute of Limitations is there applied to probating wills.¹ The ruling seems exceptional. The general Statute of Limitations is held elsewhere not to apply. Thus a will was admitted to probate in Illinois thirteen years after the testator's death,² and in Massachusetts sixty-three years thereafter.³ But in this connection it must again be said that the question for any particular State can be settled only by consulting its statutes and the decisions thereunder.

¹ Allen v. Freeman, 96 Ky. 313.

² Robbin v. Mueller, 114 Ill. 343.

³ Haddock v. Boston & M. R. R. Co., 146 Mass. 155.

§ 196. Jurisdiction for Probate in Common and Solemn Form.

—The probate may be in the “common,” or “non-contentious” form, granted upon the affidavit of the applicant showing the testator’s domicile and death; or it may be in the “solemn,” or “contentious” form, upon citation to the widow and next of kin, and a regular trial.

Courts of probate have original exclusive jurisdiction in all of the States to take probate of wills in common form. In some States, where notice to the widow and next of kin is required even in this form of proof, the probate obtained in the probate court seems to have all the force and validity of a proof in solemn form, and is conclusive, both as to real and personal estate, if not appealed from or annulled in equity for fraud, or some cause which gives equity jurisdiction over judgments at law.

But elsewhere parties interested after the will is established in common form can demand proof afresh in solemn form. In a number of States the probate court has jurisdiction over the proof in solemn form, but in most of them the probate originally obtained *ex parte* or in common form, in the probate court, may be contested either in chancery, or by action in a court of law; and the proceedings in such court constitute the proof in solemn or full form, or, as is sometimes said, *per testes*.¹

§ 197. Jurisdiction over Probate of Lost Wills.—The probate of wills lost, suppressed, or destroyed is ordinarily within the jurisdiction of probate courts, as coming within the scope of their general jurisdiction. But in most of the United States chancery courts exercise the power to establish wills on the ground that they have been lost, suppressed, or destroyed, and the jurisdiction in such cases seems to be concurrent, unless the statute restricts the jurisdiction to one of these courts.

§ 198. Method of Proof in Common Form.—The probate of a will in common form is in its nature *ex parte*, without notice to any one interested in or against it, and resting, in some States, upon the evidence or affidavit of a single witness, which in some instances may be the executor or proponent himself. It “applies only for convenience, expedition, and the saving of expense, where there is apparently no question among the parties

¹ See Woerner on Administration, § 215.

interested in the estate that the paper propounded is the genuine last will and as such entitled to probate. For contentious business before the court, probate in common form would be quite unsuitable."¹ According to the English ecclesiastical practice, in which this form of probate originated, a will is proved when the executor presents it before the judge and produces more or less proof that the testament presented is the true, whole, and last testament of the deceased, whereupon the judge passes the instrument to probate, and issues letters testamentary under the official seal. Under the Court of Probate Act the executor may at his pleasure prove the will in common or in solemn form, the difference in effect being that the probate in common form may be impeached at any time within thirty years by a person having an interest, whereupon the executor will be compelled to prove it *per testes* in solemn form; whereas, if once proved in solemn form of law, the executor is not to be compelled to prove the same any more, and the instrument remains in force, although all the witnesses be dead.

According to the practice in American probate courts, a similar course is pursued in most of the States; usually, the executor (but it may be any other person having an interest) presents the will, and sets forth in a petition (which may be a printed blank provided for such purpose) the facts of the death of the testator, his last domicile, the names and places of residence of the surviving widow or husband, if there be such, and of the next of kin; and alleging that the paper or papers presented constitute the last will of the deceased, prays for the probate thereof and for appointment of executor or administrator, as the case may be. It is held in some of the States, as has already been mentioned, that proof may be made by a single subscribing witness; but in most of them the testimony of both or all subscribing witnesses is required, if they are living and within the reach of the process of the court. Whether the will be proved by the testimony of one or all of the witnesses, or by the affidavit of the executor, or by other witnesses, the facts necessary to be proved are in all instances the same; that the testator was of sound mind, and that he and the subscribing witnesses complied with all the requirements of the statute

¹ Schoul. Ex. § 66.

respecting the execution and attestation by the requisite number of witnesses. The essential qualities of a will have been considered in a former chapter of this work, to which reference is hereby made.¹

§ 199. **The Probate in Solemn Form.** — While the proof in common form is *ex parte*, in the proof in solemn form all persons interested in the will, as well as all persons who in the absence of a will would be entitled to inherit, must be made parties by service of personal notice or by publication, unless they voluntarily appear. Creditors of the deceased as such are not made parties, since their interests are not affected whether the will stand or fall.

The difference in the result of these two forms of proof is this: The proof in common form, while good as long as it is not questioned, is virtually set aside by demand for proof in solemn form; whereas the proof in solemn form is an ultimate judgment.

In the mode of proving the will there is the distinction that in proof in solemn form all attesting witnesses competent to testify and within reach of the process of the court must be examined; though this is not insisted on in some States: in proof in common form, on the other hand, this requirement is generally not made. In a few States this distinction fails. It is there necessary to produce all accessible subscribing witnesses for proof in common form.

Parties are generally entitled to a jury when the will comes up for proof in solemn form. This is not true of the proof in common form.

§ 200. **Contest of Probate.** — The *ex parte* probate cannot be attacked in a collateral proceeding, but only in a direct proceeding brought to annul, set aside, or revoke such probate. This may be by appeal from the decree establishing or rejecting the probate, by any person interested in the will, but which since the right thereto is purely statutory must be pursued in strict compliance with the requirements of the statute; or it may be by contest, which any interested person may institute who was not a party to the original proceeding resulting in the probate or rejection of the will, or in some States even by one

¹ *Ante*, §§ 26-43.

who was a party, had either in the court which granted the probate, or in a superior court of law, or in a court of chancery, as may be provided by statute. These proceedings are in most instances limited to a given period of time after which the probate becomes absolutely conclusive.

The original or *ex parte* probate is *in rem*. But on a contest "whenever a controversy in a suit between the parties arises respecting the validity of the will" it becomes in some respects *inter partes*, requiring notice to all parties interested in the will or against it. In other respects these proceedings, also, are *in rem*, the issue being will or no will; and though as in some States such contest be regarded in the nature of an appeal and trial *de novo*, and be considered an action at law (partaking in some respects however of a proceeding in equity) and effect given to the verdict of the jury accordingly, yet the court must proceed either to establish or reject the will. Hence the contestant cannot be permitted to dismiss or to take a voluntary non-suit; nor, for the same reason, can contestant be compelled to give security for costs; nor can the issue be varied or restricted by averments in the pleadings or by the consent or acquiescence of the parties; nor can the parties by stipulation authorize a judgment whereby the will is annulled as to some and not others; nor can the contest be determined by stipulation, at least not where one of the beneficiaries is not *sui juris*. But the contest of probate may be confined to a part of the will, when such part only is attacked as having been made under undue influence or obtained by fraud; so also when a will is annulled at the instance of one in whose favor a longer time is given to make contest by reason of his having been under disability, the will must be set aside as an entirety, and the action enures to the benefit of all others interested, though as to them the time within which the will could be attacked has elapsed; but on this point the contrary has also been held.

This right to contest the validity of a probate granted, in the method pointed out by the statute, may be exercised by any person whose interests are substantially affected by the will so established, whether domestic or foreign. But since a person cannot hold under a will and also against it, one who accepts a beneficial interest under a will thereby bars himself from

setting up a claim which will prevent its full operation, at law or in equity; and such person will not, therefore, be allowed to contest a will, unless he has acted in ignorance of his rights, and, restoring conditions *in statu quo ante*, he return without unreasonable delay the benefits received. A creditor of the decedent is not a party in interest so as to authorize him to invoke the power to revoke, annul, or contest the probate of a will, nor one who is incapacitated to take by descent from the decedent; nor a purchaser from an heir, after the probate. Neither, for the same reason, can such proceedings be instituted by the general creditor of a disinherited heir, although it is held that a judgment or lien creditor of the heir, whose lien rights in the property itself would be cut off by the probate, is a party in interest who may contest the validity of the will of the ancestor of the heir. Neither can the widow, who is entitled to take against the will as in case of intestacy, (although she could in such case administer) contest the will; nor where one is given by the will precisely the same interest he takes by descent in case of intestacy. Such right to contest can only be exercised by one having a pecuniary interest in the estate, and in some States, as above stated, by such persons only as were not made parties to the original proceedings resulting in the probate or rejection.

§ 201. **Proof when Testimony of Subscribing Witness cannot be obtained.** — It is self-evidently indispensable to admit *aliunde* evidence to prove the will, if any one or more of the attesting witnesses are dead, insane, or cannot, for any reason, be compelled or permitted to testify on the probate thereof. Thus where one of the attesting witnesses is probate judge, the will may be proved by the other witnesses; where any of them are dead, insane, or incompetent to testify, or where their place of residence or whereabouts is unknown, so that their testimony cannot be obtained, proof may be made of their handwriting, and of the handwriting of the testator, and the will admitted to probate upon such proof. But in order to make such testimony admissible, it must be shown that it is impossible to obtain that of the subscribing witnesses, either by taking their depositions, as is provided for in some States in case of attesting witnesses being beyond the reach of the process of the court,

or by securing their personal attendance. Where the statute does not authorize the taking of the depositions of subscribing witnesses, secondary evidence is admissible, upon proof of their being beyond reach of process of the court in which proceedings are pending. In all such cases the absence of the witnesses must be satisfactorily accounted for, after proof of such diligence in the search for them and endeavor to obtain their testimony as is required ordinarily before evidence of a secondary nature is admitted.

For the same reason the validity of a will cannot be permitted to rest upon the veracity or memory of the attesting witnesses: to do so would be subversive of justice and destructive of the rights of the testator as well as of the beneficiaries under the will. Hence a will may be established although some or all of the subscribing witnesses fail to remember the essential facts to be proved, or where their testimony, biased by prejudice, interest, or ill will, negated such facts. It is held that where there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attestation clause and the surrounding circumstances satisfactorily establish its execution.¹ The testimony of an attesting witness invalidating a will ought to be viewed with suspicion, because such person by his act of attestation solemnly testifies to the sanity of the testator; it was said that no fact stated by such a witness can be relied on when he is not corroborated by other witnesses. But of whatever effect the recitals in the attestation clause may be where the witness fails to remember what occurred, they are not sufficient to outweigh his positive statements in contradiction thereof.

§ 202. **Witnesses disqualified by Interest.** — In discussing the qualifications of the witnesses who subscribe the will it was pointed out that the statutory provision, now almost universal, abrogating the common-law disqualifications of witnesses generally on account of interest, did not apply to those witnesses who subscribe the will.² The competence of interested parties, apart from subscribing witnesses, to testify in will contests, is determined by the statutes of the several States, and is not a

¹ *Rugg v. Rugg*, 83 N. Y. 592, 594.

² *Ante*, § 38.

subject for discussion here, save as such witnesses are called on to perform the part of attesting witnesses, that is, prove the execution of the will. In some States the legatees and heirs at law, in a contest to set aside a will, are not competent witnesses to show the testamentary incapacity of the testator; in others they are held competent witnesses to the testator's capacity.

There seems to be no reason why a legatee or other person interested in the will should not be competent to testify *against* a will, on the same ground which renders an heir competent to testify in its favor, where his interest is diminished by the probate of the will. So the incompetency of the deceased's attorney or physician to testify to professional communications is waived by the testator's request to him to sign as an attesting witness; and it is generally held that the executor may waive the statutory inhibition against such testimony by the testator's physician.

§ 203. **Proof of the Testator's Sanity.** — Attention has been called to the conflict of authority as to where the burden of making *prima facie* proof on the issue of sanity lies. How far the non-expert witness can express his opinion as to the testator's sanity generally has also been discussed.¹ In this connection it may be observed that the rule of evidence limiting the witness to the statement of concrete facts, and excluding all expression of conclusions therefrom, so often applied in trials with irritating narrowness on other issues, is liberally construed in will contests.

§ 204. **Proof of Lost Wills.** — The presumption arising, where a will which was in the possession of the deceased cannot be found at the time of his death, that it was destroyed by the testator *animo revocandi*, may be rebutted by proof that it was destroyed after his death, or during his lifetime without his knowledge or consent; or by the testator himself while he was under the fraudulent influence of another, or in a fit of insanity, when he was incapable of understanding the nature and effect of his act, and such a will may, upon positive proof of destruction, or of diligent search and non-existence, be admitted to probate.

¹ *Ante*, § 20.

The presumption of destruction *animo revocandi* may be rebutted by such evidence as produces a moral conviction to the contrary, and the acts and declarations of the testator are admissible for such purpose. So also it may be proved by circumstantial evidence that the will has been lost or destroyed without the knowledge of the testator. Where a will is detained by a foreign court, so that the proponent cannot produce it for probate, secondary evidence thereof is admissible, as much so as if it were a lost will.

The execution and attestation of the lost will must be proved with the same certainty and fulness as in case of proving an existing will, including proof of the testator's sanity or testamentary capacity; and by the same witnesses which are required to prove a will produced for probate. Thus the subscribing witnesses must be called, if within reach of the process of the court; and if not, depositions of such as may be reached must be taken, and if the law does not require the depositions of witnesses residing abroad, then proof may be taken as in case of the death or insanity of subscribing witnesses.

The contents of the lost will upon which probate is prayed must be proved clearly and distinctly, with a sufficient degree of certainty to establish the legacies and devises, and that none have been omitted. It was laid down by Swinburne, that, "if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof, these two witnesses, so deposing to the tenor of the will, are sufficient for the proof thereof in form of law;" but it seems now to be held in England that the contents of a lost will, like those of any other instrument, may be proved by secondary evidence; that they may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. In the absence of statutory provisions on this subject this is recognized in the several States to be the law, at least to the extent of establishing the contents by the testimony of a single witness. The rule that, where one destroys a written instrument, an innocent party will not be required to make strict proof, in a judicial inquiry concerning its contents, against the spoliator, is sometimes applied to a will; where part of the heirs of a testator connive at the destruction of his will, an

innocent legatee may obtain probate of the same upon proof in general terms of the disposition which the testator made of his property, and that the instrument purported to be his will and was duly attested by the requisite number of witnesses.

It appears from a discussion on the revocation of wills, in a former chapter, that the execution of a later will inconsistent with a former one operates as a revocation of the former will, though the revoking will is not produced.

It seems to result from the necessity of proving the contents of a lost will with sufficient certainty and clearness to admit of their legal construction, that a part only of a lost or destroyed will where other parts cannot be proved, or where it is not known whether the instrument contained other or contradictory provisions, cannot be admitted to probate. It is so held in several States. But in others, isolated portions of lost wills clearly proved have been established, although other portions could not be proved.¹ The subject of proving lost wills is now regulated by statute in many of the States.

§ 205. **Proof of Wills in Part.** — Although it is not the province of the court of probate to pass upon or determine the legal validity of the provisions of a will, or whether they are rational and capable of being carried into effect, yet it becomes necessary sometimes to admit the will to probate in part, and reject it in part. For if a court of probate be satisfied that a particular clause has been inserted by fraud, in the lifetime of the testator, without his knowledge, or by forgery, after his death, or that he has been induced by fraud or undue influence to make it a part of his will, probate will be granted of the instrument, with the reservation of that clause. And so where a page is torn from an executed will and another substituted without re-execution, the will, as originally executed, will be admitted to probate; the contents of the destroyed page being proved by competent testimony, no effect being given to the invalid substituted page. Or where a clause is inadvertently introduced in a testamentary paper, which the testator has not directed to be inserted, and he executes the paper, not having been read over to him, probate will be granted of the remainder of the paper, omitting

¹ This is specially permitted as against the spoliator of a will in favor of an innocent legatee: *Jones v. Casler*, 139 Ind. 382, 393.

such clause. So while a document referred to in the will and shown to have been in existence at the time of its execution, and which is clearly identified as the document to which reference was made by the testator, may be adjudged to form part of such will, yet if such extraneous paper be not in existence at the time of the execution of the will, it is not entitled to probate as part of the will, though the will be admitted to probate.

This principle of probate in part has been extended to cases in which part of a destroyed will only could be proved, and probate granted as to so much of such will; and relied on as justifying the rejection of clauses held void as being inconsistent with public policy, or impossible of execution, while the remainder of the will was admitted to probate. But this seems inconsistent with the functions of a court of probate, which determines only whether the instrument propounded has been executed by the testator and attested by the witnesses in the manner prescribed by the statute, and that he possessed sufficient testamentary capacity, — in other words, whether the instrument is the testator's spontaneous act, expressing his last will in the form recognized by law. Its approval of the will relates only to the form: void bequests are not validated thereby, nor should the probate distinguish between valid and void, certain and uncertain, rational or impossible, dispositions of the testator. All such questions are for the courts of construction, which are bound by the judgments of courts of probate only as to the due execution. Hence, although the court of probate may reject such portions of the paper as are not the testator's spontaneous act or will, it cannot, even by consent, order any passage to be expunged which the testator, being of sound mind, intended to form part of it.

Several testamentary papers and codicils may together constitute the last will of the testator, and should all receive probate together, as constituting one will.

§ 206. **Probate in Fac-simile.** — The effect of interlineations and erasures in a will have been pointed out in an earlier chapter. Where alterations are satisfactorily shown to have been made before execution, it is usual to engross the probate copy of the will as altered, inserting the words interlined in their

proper places, and omitting words struck through or obliterated. But in cases where the construction of the will may be affected by the appearance of the original paper, the court will order the probate to pass in *fac-simile*, so as to assist the court of construction in finding the meaning of the testator. This is obviously of great importance where the will is to receive construction in a court different from that which grants the probate, and the court of construction is denied access to the original will.

§ 207. **Testator's Declarations as Evidence in Probate of Will.** — The conversations, statements, and declarations of the testator are always admissible on the question of his testamentary capacity, since they are the most direct manifestations of his mental condition; their value as evidence being, in this respect, fully equal, if not superior, to that of his acts, conduct, behavior, or appearance. Many phases of insanity — delusions, hallucinations, and the like — are capable of proof by this means only. Hence great latitude is allowed in proving declarations, acts, and statements of a testator, sometimes extending over many years, to establish the status of his mind when he made his will. Of course the declarations are not competent to prove the truth of the matter stated in them, and when the content of a statement or declaration concerns a fact in issue in the proceeding, the jury should be cautioned on this point. Diaries kept and letters written by a testator, either before or after the execution of the will, are, like his verbal declarations, proper evidence as bearing upon his mental capacity, and the condition of his mind with reference to objects of his bounty, but not competent to prove the facts stated in them.¹

Another question is presented when the declarations of the deceased are offered, not to show the condition of the testator's mind, in which case the truth of the statement is not involved, but as evidence of the fact stated, as bearing on the main issue. Where for instance the issue is undue influence or whether the propounded will is a forgery, declaration of the testator that he had never made a will, uttered subsequent to the alleged execution of the document under investigation, are not offered to show the mental state of the deceased, but are admissible if

¹ See Woerner on Administration, § 225, and numerous cases there cited.

at all for the sole purpose of establishing the fact stated by the deceased. When the testator's declarations are thus offered upon the issue of undue influence, fraud, or forgery in the making of the will, the authorities are not in accord. In the leading case of *Sugden v. St. Leonards*¹ the testator's declarations were admitted to establish the provisions of a lost will. In *Throckmorton v. Holt*,² on an issue as to the forgery of a proffered will, evidence of the testator's declarations wholly inconsistent with the provisions of the document in question (thus tending to show that it was not his will) were rejected. A full collection of authorities on both sides will be found in the latter case.

Clearly the physical fact of revocation of a will cannot be proved by declarations of the testator. His expressions of approval or dissatisfaction have been held admissible in several cases as bearing on his intention in destroying the will, or proving that a lost will is not revoked. This is but a phase of the question whether a testator's declarations are receivable to prove his intentions, and the rulings seem in conflict with *Throckmorton v. Holt*.

§ 208. **Admissions by Beneficiaries under Will.** — In will contests the question arises whether admissions by beneficiaries under the will, tending to show lack of capacity in the testator or the exercise of undue influence over him, should be received in evidence. Such admissions against interest should clearly be received where the person making them is the only one seeking to uphold the will. So too if there is a showing of a conspiracy to procure the will among all the beneficiaries, admissions by one of the conspirators during the conspiracy can be offered in evidence against all on a well-settled rule of evidence.

But the beneficiaries under a propounded will have no joint interest in the legal sense of the term; and the rule is clear that the admissions by one cannot be used against others on the same side unless the interest is joint. The admissions of one beneficiary should not injuriously affect others. Since the issue is merely will or no will, such admission must affect all claimants under the will, and cannot be limited to the person making the admission. It is accordingly held by the weight of authority

¹ L. R. 1 Prob. Div. 154.

² 180 U. S. 572, 585.

that the admissions of one of several beneficiaries are not receivable in evidence in a suit as to the establishment of a will, save in case of a conspiracy involving all beneficiaries.

§ 209. **Wills proved in Foreign Jurisdiction.** — The principle requiring the title and disposition of real property to be governed exclusively by the law of the country or state in which it is situated, — *lex loci rei sitæ*, — and that requiring personal property to follow the law of the owner's domicile, — *lex domicilii*, — together with the extra-territorial invalidity of municipal laws and regulations, have heretofore produced considerable divergence in respect of wills which have been executed and admitted to probate in sister States or foreign countries, and operate upon property situated within the jurisdiction of the forum where they are sought to be enforced. It is now a fully established rule in England, that in order to sue in any court of law or equity, in respect of the personal rights or property of a deceased person, the plaintiff must appear to have obtained probate of the will, or letters of administration in the court of probate there; and this is so in America in all the States with the exception of those in which the statutes confer certain powers upon foreign executors and administrators, which may be exercised by virtue of such statutory regulations, or give validity to a foreign probate. It follows that a will made in another State or foreign country, and proved there, disposing of property elsewhere, must, except in the States holding as above, also be proved in the State where the property is situated, or courts cannot enforce the provisions of such will.

Generally, the court in which the will is to be proved anew will adopt the decision of the court in the foreign country where the testator died domiciled as to the probate of a will disposing of personal property; for it is a clearly established rule, that the law of the country in which the deceased was domiciled at the time of his death not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will without regard to the place either of birth or death, or the situation of the property at that time. In most States it is provided by statute that the will of a non-resident, admitted to probate according to the law of the State in which he resided at the time of his death, may be ad-

mitted to probate upon the production of a duly authenticated copy thereof together with the probate, without other proof or notice. In other States notice is required to be given to persons interested.

In many States it is affirmatively provided that the foreign probate is conclusive only in so far as the will concerns personal property; to pass title to real estate, it must appear, either by proof furnished in the forum *loci rei sitæ*, or by the authenticated copy of the evidence upon which the foreign probate was granted, that in the execution, attestation, and proof of the will the requirements of the law of the State in which the land lies have been complied with. In some of the States the foreign probate seems to be made conclusive as to real as well as to personal property; but unless such be the express or necessary import of the statute, it must affirmatively appear from such foreign probate, or other proof, that the law of the forum has been observed in making and proving the will in order to give validity to its disposition of real estate. There are some States, also, in which the probate of the foreign jurisdiction, duly authenticated, either according to the act of Congress, or in accordance with the regulations prescribed in the statutes of such States, are allowed to be given in evidence without probate anew, or previous approval by the probate court of the *loci rei sitæ*.

In several of the States the statutes seem to provide only for the *recording* of a foreign will.

A will is admissible to original probate in the jurisdiction of the testator's domicile at the time of his death, without regard to where he died or where the will was made. And it is held in some jurisdictions that while the courts of the ancillary State have jurisdiction, in the sense of power, to probate a will there before it is admitted to probate in the testator's foreign domicile, and if there is special occasion will do so, yet as a rule the probate court of an ancillary State should, as a matter of comity, refuse to entertain a petition for probate of a will before it has been proved in the State of the domicile, where it should be primarily established. And in most States it has been held that the proof must be in accordance with the law of the domicile at the time of death,

although the statute provides that property may be bequeathed if the will be executed and proved "according to the laws of this State, or of the country, State, or Territory in which the will shall be made."

The provision of the Constitution of the United States requiring full faith and credit to be given in each State to the public acts, records, and judicial proceedings of every other State, and the act of Congress relating thereto, do not give such acts, records, or proceedings any greater force and efficacy in the courts of other States than they possess in the States from which they are taken, and apply only so far as such courts have jurisdiction. Hence while the judgment of a court admitting a will to probate is binding on the courts of every State in respect of all property under its jurisdiction, whether real or personal, yet it establishes nothing beyond that, and does not take the place of the necessary formalities to make the will valid in respect of real property in other States, if wanting.¹

§ 210. **Revocation of Probate.**— The power to revoke probate of a will is exercised by English courts of chancery in cases where it is clear that probate courts are powerless to afford adequate relief against injury in consequence of fraud or perjury committed in obtaining the probate. But in the United States there is no such power in chancery, except as pointed out by statute in some of the States. "Wherever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by the court of chancery on any ground."² This language is quoted and approved by Justice Bradley of the Supreme Court of the United States.³ Judge Story, the stanch vindicator of the most comprehensive chancery powers, says that there is but one exception to the concurrent jurisdiction of chancery courts in all matters of fraud, which is fraud in obtaining probate of a will; and he finds it "not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is

¹ For details and authorities see Woerner on Administration, § 226.

² State v. McGlynn, 20 Cal. 233, 268.

³ In Broderick's Will, 21 Wall. 503.

clearly settled by authority." ¹ The common-law rule is stated to be that the remedy for fraud in obtaining a will is exclusively vested, in wills of personalty, in the ecclesiastical courts; and in wills of real estate, in the courts of common law.

The power to revoke exists, however, in the probate court itself, in all cases where the court acted without jurisdiction, without notice, where the statute requires notice, or in disregard of some statutory requirement, so that the decree or judgment rendered is void; and so where a later will is discovered subsequently to the probate of an earlier one, there is no doubt of the power of the probate court to establish the later will. But where a will has been conclusively established, the production of a later will for probate, not in terms revoking the former, does not raise the question of revocation, and such revocation cannot be determined in such proceeding if there is room for dispute as to construction. The probate of the former will should be left to stand for what it is worth, and its effect decided elsewhere. It has been held that no lapse of time will bar an application for the revocation of the invalid probate of a will, in the court which granted it; but unless the power to review or revoke is conferred by statute, no merely erroneous probate can be set aside by the probate court after the term at which it was granted has expired.

The contest of probate has been heretofore discussed in § 200.

§ 211. **Effect of Probate.** — It has already appeared that at common law, without the *constat* of the probate court, no other court can take notice of the rights of representation to personal property, and that wills devising real estate must be proved in the common-law courts. By the statute of 20 & 21 Vict. c. 77, § 13, all wills, whether of real or personal property, are required to be proved in the court of probates. Similar statutes had long before existed in most of the American States, and the *constat* of the probate court is necessary to the validity of wills of personalty in all, and of wills of realty in nearly all of them.

In a few States the probate of the probate court is neither essential nor conclusive as to the validity of wills in proving title to real estate; such will may be contested, if it has been

¹ Story's Eq. Jur., § 440.

admitted to probate in the probate court, or proved originally if not, in all common-law courts in which the title to land thereby affected is in issue. With these exceptions, however, neither courts of law nor of equity will take cognizance of testamentary papers, or of the rights depending upon them, until after probate in the probate court. That such probate is conclusive, unless appealed from, set aside, or annulled, in the method pointed out by the statute, has already been stated. It may be mentioned, in connection with this subject, that the efflux of time, in some instances, operates to confirm a probate otherwise assailable for informality, or renders the probate conclusive after a certain period.

It has already been remarked that it is the function of a court of probate to determine whether the instrument propounded has been executed by the testator and attested by the subscribing witnesses in accordance with the statutory requirements, and whether he possessed sufficient testamentary capacity to make a valid will. It is no part of the proceeding on probate to construe or interpret the will or any of its provisions, or to distinguish between valid and void, rational and impossible, dispositions; if the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution, or valid under the law. Hence the probate does not establish the validity of any of its provisions: this is to be determined by the courts of construction, when any question arises requiring their interposition.

CHAPTER XXV.

OF THE GRANT OF LETTERS TESTAMENTARY.

§ 212. **How the Executor is Constituted.** — Upon probate of the will, letters testamentary may be granted to such of the executors named by the testator as are willing to assume the trust. The court has no discretion in this respect, but must grant the letters to the person or persons nominated, unless such person is disqualified by law. One named as executor is entitled to letters testamentary, although the will contain no other provision of any kind, and an executor has power generally to administer all the personal property of the deceased, although the testator die intestate as to a portion thereof. There need be no appointment by the testator in direct terms; it is sufficient if a person is designated to discharge those duties which appertain to the office of executor, or that any language is used from which the intention of the testator may be inferred to invest such person with the character of executor.

The test of a constructive appointment as executor, or of an executor according to the tenor of the will, may be found by considering whether the acts to be done or the powers to be exercised by the person are such as pertain to the office of an executor. Thus, the testator's declaration "that A. B. shall have his goods after his death to pay his debts, and otherwise to dispose at his pleasure," and the like expressions, may suffice for this purpose. The appointment to a trust under the will, not essential to the office of an executor, does not constitute the trustee an executor according to the tenor, for the offices of an executor and of a trustee are distinct, and may be vested in different persons, and when they are vested in the same person, the functions of each are nevertheless to be performed by him in the respective capacity, the probate court having jurisdiction over him in the one, but not in the other capacity. But where the testator uses the word "trustee," and imposes duties in-

volved the functions of an executor, this will be held a good appointment as executor.

As a testator may nominate several executors to execute his will jointly, so he may direct a substitution of several, one after the other, so that, if the first will not act, the next may, and so on. Indeed he may delegate the appointment of an executor to some third person, and letters testamentary will be granted to the person by him named. The executors may be given power to fill vacancies in their number. The testator may provide that upon the death of his executor another shall complete the administration. In these cases the successor upon his appointment possesses all the powers of, and is, an executor, and not an administrator *de bonis non*.¹

§ 213. Residence as Qualification of Executor. — At common law non-residence of the testator's appointee does not disqualify him as executor. The same rule prevails in many American States. But in many States non-residents of the State are not permitted to act as executors, and in some others there are varying restrictions as to non-resident executors, to be found in the respective statutes.²

§ 214. Infancy as disqualifying Executor. — At common law and in many of the American States infancy does not operate as a disqualification to the eventual right of executorship; but the authority to qualify or act as such remains in abeyance until the infant reach the age of majority, or such age as may be fixed by law or statute as necessary to qualify. Previous to the Statute of 38 Geo. III. c. 87, § 6, this age was fixed in England at the age of seventeen years, and this is the law in several of the States; in others the age of eighteen years is fixed; in many it is twenty-one years, and in most of the others the age of legal majority.

§ 215. Coverture as disqualifying Executrix. — According to the canon law, a married woman may sue and be sued alone, without her husband, and it was held in the spiritual courts of England that, in the absence of a writ of prohibition, she may take upon herself the executorship of a will without, or even against, the husband's consent or will. At common law, how-

¹ Kinney v. Keplinger, 172 Ill. 449.

² For details, see Woerner on Administration, § 230.

ever, the consent of the husband is necessary to enable the wife to assume the office of executrix; but he cannot compel her to assume the office against her will, although she will be bound, if the husband administers as in the wife's right, though against her consent, in so far that she cannot during his lifetime avoid or decline the executorship.

In many of the American States married women are not competent to act as executrices, and if a *feme sole* executrix marries, her authority is thereby extinguished; while in others she can do so only with the consent of her husband. In some a married woman may become executrix independently of her husband. The common-law doctrine, that the husband becomes executor in right of his wife upon marrying a *feme sole* executrix, is recognized in a few States, but does not prevail generally.

§ 216. **Mental Incapacity, Immorality, and other Disqualifications for Executorship.**—In most of the States there are statutory provisions disqualifying persons named as executors, on account of mental incapacity and immorality. Insane persons, persons convicted of infamous crime, and such as are incompetent on account of drunkenness, improvidence, or want of understanding or integrity, cannot be admitted as executors.

American courts give a liberal interpretation to statutes authorizing the rejection of unsuitable executors.

Idiots and lunatics are deemed incapable of becoming executors, both at the common and the civil law. Poverty, or even insolvency, constitutes no legal disqualification.

It is said to be settled law in England that where a corporation aggregate is nominated as executor, it may appoint persons styled syndics to receive administration with the will annexed, who are sworn like other administrators, because they cannot prove the will, or at least cannot take the oath for the due execution of the office. In the United States the prevalence of authority, once against the competency of corporations aggregate to act as executors, seems now to turn the other way.

Corporations or trust companies may now be found in most States, permitted by statute to exercise the functions of executors and administrators in connection with trust funds. It has also been held that a firm may be nominated as executors,

and that in such case letters testamentary will be granted to the individual members of the firm. And so of a corporation sole; the individual composing it may be admitted as executor.

§ 217. **Acceptance or Refusal of Executorship.**—At common law, and in those of the States in which the authority of the executor is recognized as emanating from the will without a formal grant of letters testamentary, the question whether a person named in the will as executor has or has not accepted the office is sometimes difficult of solution. He cannot, of course, be compelled to accept the executorship, since it is a private office of trust named by the testator, and not by the law; he may refuse, even if in the lifetime of the testator he has agreed to accept the office. The right to refuse may be lost by the executor, if he do any act which amounts to administration; for if he once administer, it is considered that he has already accepted the executorship, and the court may compel him to prove the will; but if the court accept his refusal, notwithstanding he may have acted, the grant of administration to another will be valid.

In the United States this subject is, on the one hand, of far smaller importance than at the common law, because in most of the States an executor has no authority to bind the estate of his testator without a formal grant of letters testamentary; and is, on the other hand, more readily determined, since it is mostly regulated by statutes. But since administration with the will annexed can only be granted in default of an executor named in the will, it is necessary that the court, before granting such administration, shall be informed that the executor, or all of several executors named, have renounced the trust, or are incompetent to serve. No formality is necessary in making such proof beyond compliance with the requirements of the statute; it is sufficient if the intention to renounce is clearly expressed in writing, and filed in the court at any time before he undertakes the office or intermeddles with the estate, even after propounding the will for probate, or being sworn as executor. A renunciation may be inferred from the conduct of the executor after being informed of his nomination, without formal communication from him. For the purpose of granting letters, either testamentary or of administration, the

probate court may, at the instance of a person interested, or perhaps upon its own motion, summon the executor before it to prove the will; and as the executor cannot avoid a will by refusing to accept the trust, he may thus be compelled either to accept or renounce it, so that administration with the will annexed may be granted. But the executor should be cited to show cause why he should not accept or decline the trust before letters with the will annexed are granted. The time when it becomes imperative for the executor named to accept or renounce is when he is cited to do so; mere inaction and delay unaccompanied by act of intermeddling with the estate cannot amount to an acceptance against his consent. It seems obvious that the death of one nominated as executor in a will before the grant of letters, and *a fortiori* before the probate of the will, amounts to a renunciation.

An executor nominated in the will, who has renounced, may retract his renunciation, and assume the office at any time before the grant of letters testamentary to other executors, or of letters of administration with the will annexed. So if an acting executor has been removed for cause, or died, the renunciation of one named as co-executor may be retracted, and letters granted as if it had not been made; and, in the absence of statutory regulation to the contrary, one of several executors named in a will, not taking letters testamentary when his co-executors do, may come in at any time afterward and do so.

CHAPTER XXVI.

LETTERS OF ADMINISTRATION.

§ 218. **Principles governing the Grant of Letters of Administration.** — Administration is granted upon the estates of persons dying intestate, and *cum testamento annexo* upon the estates of those who left a will, but no executor competent or willing to assume the office. Before letters of administration can properly be granted, there must be proof to the satisfaction of the probate court that the decedent died intestate while domiciled within the territorial jurisdiction of such court, leaving property; or that he died elsewhere, leaving property within such jurisdiction. If he left a will, it must also be shown that there is no executor competent or willing to execute it.

Aside from the statutory regulations, which in every State determine what persons are entitled to the administration, and which of course must be observed in appointing an administrator to office, the discretion vested in probate courts in this respect is to be governed by well-known general principles. The most important of these is, that administration should be committed to those who are the ultimate or residuary beneficiaries of the estate, — those to whom the property will go after administration. To secure to them the right to administer is the paramount object of the statutes fixing the order of preference, and constitutes the aim and intention of courts in the exercise of such discretion as is vested in them. It is obvious that those who will reap the benefit of a wise, speedy, and economical administration, or, on the other hand, suffer the consequences of waste, improvidence, or mismanagement, have the highest interest and most influential motive to administer properly. Hence it is said that the right to administer follows the right to the personal property, — a rule the binding force of which is recognized in America, as well as in England. The correlative of the rule is equally true, — that administration

should not be granted to one whose interests are adverse to the estate.

The prominence of the right of the surviving to administer the estate of a deceased spouse is strongly corroborative of the validity of this rule. In England the right belongs to the husband exclusively of all other persons, and the court of probate has no power or election to grant it to any other. This right is said not to be an ecclesiastical, but a civil right of the husband, though administered in the court of probate.

In the United States the right of the surviving husband or wife to administer on the deceased spouse's estate is generally, but not universally, accorded by statute; and whether the reason be found in the husband's marital right to the wife's personalty, extending in some States to her choses in action, or in any of the other causes suggested, it is undeniable that they have, besides their personal interest in the estate, the control of the interests of the minor heirs, where there are such, being the natural guardians of their persons and estates, and thus unite in themselves, as the surviving centre and head of the family, a greater interest in the estate than any other single person — in all cases, at least, where the deceased leaves minor children. The exceptions to the right of husband or wife to administer still further corroborate the principle upon which the rule is founded. It is held, in several States, that where by antenuptial agreement or by articles of separation the property of the husband or wife does not pass to the survivor, he or she is not entitled to the administration;¹ but if it gave the wife a power of disposal of her separate property which she has not executed, or where a devise to a trustee for the wife's use ends with her death, the husband's right to administer is not affected.² For the same reason the widow is not entitled to letters *cum testamento annexo* if she takes no part of the personal estate under the will.³

§ 219. **Husband's Right to Appointment.** — It appears from

¹ *In re Davis*, 106 Cal. 543, 547. But in Illinois the statute has been held mandatory: *O'Rear v. Crum*, 135 Ill. 294. In Missouri it is held that the husband can waive his right to administer by ante-nuptial contract: *Estate of Evans*, 117 Mo. App. 629.

² *Hart v. Soward*, 12 B. Monr. 391.

³ *Estate of Crites*, 155 Cal. 392, 101 Pac. 316.

the preceding section that in England the husband's right to administer on the estate of his deceased wife is absolute, being expressly confirmed by statute. The statutes of many of the American States embody the same or similar provisions; but in others the principle that administration should follow the right to the personal property prevails over the husband's absolute right. Thus, the husband is not entitled to administer the wife's estate to the exclusion of her children, if they inherit; nor if he is excluded from any share in her estate; but unless the statute expressly or by necessary implication deprive him of this right, it cannot be denied him.

That a marriage was voidable does not militate against the husband's right to administer the wife's personal estate, unless sentence of nullity was pronounced before her death; but a marriage absolutely void *ab initio* confers no rights upon the husband. So, also, notwithstanding a divorce *a mensa et thoro*, or his abandonment of the wife, he is entitled to administer.

§ 220. **Widow's Right to Appointment.** — Under the English statute, the ordinary is directed to grant administration "to the widow *or* the next of kin, *or* to both," at his discretion; and although, by the seventy-third section of the Court of Probate Act, the power of the probate court in making grants of administration, and deciding to whom they shall be granted, has been much enlarged, yet even under it the court is precluded from making a joint grant to a widow and one of the persons entitled to distribution (but not next of kin). If a joint grant is to be made to the widow and *one* of the next of kin, *all* the other next of kin must consent thereto; and the modern English practice is to favor the widow under ordinary circumstances.

In the United States the widow is usually preferred to all others as administratrix of her deceased husband, but her claim is neither so generally recognized, nor based upon the same ground, as that of the husband to the estate of a deceased wife, but has its basis in the division of interests between her and the kindred.

As the husband's right to administer on the deceased wife's estate depends upon a valid marriage, so the widow, to entitle her to administer her husband's estate, must be the surviving

wife of an actual marriage. Hence one who cohabited with a man who had a wife living from whom he was not divorced, although unknown to her, and although she fully believed herself to be his lawful wife, is not entitled to administer; nor one divorced *a vinculo*. A divorce *a mensa et thoro* does not, as appears from the preceding section, deprive the husband of the right to administer, nor destroy the relation of marriage, but merely suspends some of the obligations arising out of that relation; and the right of succession is not impaired. It seems, therefore, that in such case, and where the marriage was voidable, but not dissolved during the husband's lifetime, the widow's right to administer is not affected.

Where discretion is vested in the court granting letters of administration, it is generally exercised in favor of the widow, unless some good reason be shown demanding a different course. If the one of those entitled be competent, and the other not, the appointment will of course be confined to the one competent; but if neither the widow nor next of kin be under legal disability, their personal suitableness is to be considered.

§ 221. **Right of Next of Kin to Appointment.** — In an earlier chapter of this treatise the principle is indicated according to which the property of the intestate descends or is distributable as far as the course of descent is not fixed by the statute *eo nomine*. Under the fundamental principle that the right of administration follows the right of property, the rules there pointed out determine who is next of kin for purposes of administration. In States where the husband is entitled to his wife's property, if the next of kin be a married woman and she renounces, the grant is made to the husband; for he has an interest, and the grant must follow the interest, and the wife cannot by renouncing deprive her husband of his right to the grant. The preference given by statute to the next of kin is obligatory upon the court, and it is error to appoint a stranger where a son, who is eligible and qualified, asks to be appointed.

§ 222. **Right of Creditors to Appointment.** — It follows from the principle, repeatedly stated above, of committing administration to those who have the ultimate interest in the estate, that creditors or their nominees are preferred when the assets of an estate are not more than sufficient to pay the debts, and

funeral and administration expenses. They are accordingly preferred to the next of kin in some States, in others their right is subordinate to that of the next of kin, but superior to that of other persons, and the right of a creditor is generally recognized where neither husband nor wife, nor any of the next of kin, will qualify.

If those who are preferred by statute are willing to qualify, it is error to appoint a creditor.

§ 223. **Right of Public Administrator to administer.** — It appears from the consideration of the functions of public administrators in a previous chapter, that they are public officers in a sense different from that in which executors or administrators are also considered public officers, in this, that they are elected or appointed directly by the people, or the political appointing power, and assume the administration of estates *ex officio*, or, when they receive their authority over a particular estate from the probate court, the grant to them is *virtute officii*. In two of the States¹ the public administrator takes charge of estates, under circumstances pointed out by the statute, without judicial order, thus conferring upon him *quasi* judicial authority, subject, however, to the control of the probate court; while in other States his authority in each particular estate is derived from appointment by the probate court.

The circumstances under which the public administrator is entitled to appointment, or is preferred in the discretion of the court, have been discussed in connection with the statement of the functions of that office.

§ 224. **Disqualifications excluding from Appointment as Administrator.** — The persons entitled to the grant of administration according to the rules above set forth may be disqualified by statutory provision, such as infancy, coverture of a female, non-residence, etc., in which case letters of administration must be granted to some other person. It is safe to assume that what will disqualify one from acting as executor will equally defeat the right to administer; but not all persons competent as executors are likewise competent as administrators. Thus, insolvency has been held to disqualify one for the office of ad-

¹ New York and Missouri.

ministrator, on the ground that the beneficiaries of the estate are entitled to the security of an administrator's personal liability, as well as that of his bail; illiteracy, because one who can neither read nor write would be forced to trust to agents, and would be at the mercy of designing persons, thereby exposing the interests of the estate to danger of loss from mismanagement and corruption; and so subjection to undue influence of one charged with fraudulent designs against the estate. Neither poverty nor illiteracy, however, is ordinarily deemed to deprive one, otherwise preferred, of the right to administer an estate. Another disqualification in administrators, though not in executors, or in a less degree, is that of adverse or inconsistent interest. Where, for instance, one person represents two estates between which litigation ensues: in such case, he would necessarily be both plaintiff and defendant, to the manifest detriment of justice, and the jeopardy of the interests of one or both the estates. And so it would be highly improper to appoint one, whether next of kin or not, who claims in his own right assets of the estate, or which were in possession of the intestate at the time of his death, or whose interests are in antagonism to the estate. Such considerations are not permitted to interfere with the right of the executor.

What has heretofore been said concerning the statutory disqualifications of executors, applies with equal force to administrators. In most of the States an infant can neither act as, nor nominate, an administrator; married women are in many of the States disqualified, and likewise non-residents. Under statutes excluding persons convicted of infamous crime from the right to be appointed, no degree of legal or moral guilt is sufficient to disqualify, short of conviction after indictment or other criminal proceeding within the State. Intermeddling with the goods of an estate, so as to render one liable as an executor *de son tort*, does not *per se* destroy the right to administration. "Want of understanding" must amount to a lack of intelligence, and cannot be presumed from a lack of information or misinformation of the law; and "improvidence," as a ground of exclusion, is such a want of care and forethought as would be likely to render the estate and effects liable to be lost or diminished in value; it refers to such habits of the mind

and body as render a man generally and under all ordinary circumstances unfit to serve.

§ 225. **Considerations governing Discretion.** — Between applicants of the same class, all of whom are equally entitled, it is discretionary with the probate court who shall be selected, and no appeal lies from the exercise of such discretion except in case of gross abuse. But it is obvious that, in the exercise of the power of appointing administrators, the court is limited to the selection of such persons as are competent under the statute, in the order therein pointed out. Thus, if the widow constitute a class by herself, as she does in many States, she must be appointed if willing to serve, and not disqualified under the statutory regulations of the subject, no matter what objections exist to her administration, or how plausible they be. There is, in a case where priority is given by statute, no discretion.

So where the statute makes a distinction of sex between those otherwise equally entitled, the individuals composing the favored class must be appointed, if they apply, no matter how desirable the appointment of one of the other sex might be to the majority of those interested, unless the favored class are under some statutory disability. And where an unmarried is preferred to a married female, the court cannot reject the application of the former, although it is objected against her that she is a professed nun, and the inmate of a convent. Where the widow and next of kin are placed in the same class as to the right of appointment, the widow, as has already been stated, is preferred, other things being equal; a sole being likewise preferred to a joint administration.

The rule which is the foundation of the preference accorded by the statutes — *i. e.*, to commit the administration to those who are eventually entitled to the property — is equally binding upon the court, in the exercise of the discretion vested in it in choosing between several individuals placed by the statute in the same class of preference. If this class include the widow, together with children or other next of kin, the widow is, as we have seen before, generally preferred; but the preference must yield where she is unsuitable, in which case one or more of the next of kin will be entitled. In selecting from among the next of kin, the preference may be determined

by the ratio in which the parties are entitled to distribution; for if one be entitled to more than another, he will have a greater interest in the proper administration of the estate. And in cases of conflicting claims, the applicant upon whom a majority of the parties in interest agree will generally be preferred, but not, of course, unless the nominee belong to the same class; for the order of preference enacted by statute cannot be changed or ignored to the postponement of any person included therein. Other things being precisely even, the scale may be inclined by the preference of an older over a younger person; or of a male over a female; of an unmarried over a married woman; and of one accustomed to business over one inexperienced. *Cæteris paribus*, the fact that an applicant had twice been a bankrupt militates against him, to the preference of one who had not been bankrupt; and so does the fact that one, in addition to being of the next of kin, is also a creditor. Nor will one be appointed who is in such hostility to the others as will disqualify him from fairly considering their claims. The antagonism in interest, which in some States amounts to a statutory disqualification, is an important circumstance to consider in passing upon the relative claims of applicants in equal degree under the statute, although, if such person be the only applicant, the court may have no power to reject him; or, having once appointed him, though in ignorance of his unsuitableness in this respect, no power to remove him except for cause arising after his appointment.¹

§ 226. **Renunciation of the Right to Administer.** — The preference given by statute may be waived or renounced. Unless it is, the appointment of any other person is irregular, and will be vacated upon demand of a person having the preference. The renunciation may be spontaneous, or upon citation by some person interested; and it will be presumed — that is, the exclusive right to administer will be deemed — to have been waived, if letters are not applied for by the party preferred within the period prescribed for such purpose by statute. But until letters have been granted to some one else, such person may still apply for and demand letters, although the statutory

¹ The authorities for the illustrations given in this section can be found in Woerner on Administration, § 242.

period may have expired. Renunciation should be in writing and entered of record: a mere parol renunciation does not amount to a waiver of the right. And where the renunciation is coupled with a condition, which condition is not performed, the parties renouncing are not thereby bound, but may insist on their prior right. Citation to parties having a prior right to administer cannot ordinarily be issued before the expiration of the period fixed by statute within which they must make application. Under an established rule of the English ecclesiastical courts, no letters will be granted to any person in derogation of the right of those having priority, unless such parties are cited, or consent, even where the party who has the right has no interest in the property to be administered; but this rule is not invariably applied to cases where the selection is in the discretion of the court. In America the rule is the same. Before any one can be appointed administrator, who is not in the preferred class, notice must be given to those having a prior right, to appear and claim their privilege, or show cause why the applicant should not be appointed. To dispense with the citation, those having the preference should renounce their claim, or signify their consent to the grant of the petitioner's request by indorsement upon the petition, or some other writing of record. But no notice is necessary to the other parties in the same class with the applicant; the appointment may be made *ex parte* to any of those who are equally entitled. Accordingly, letters granted to strangers, or to persons having no preference under the statute, without notice to those being preferred, will, upon the application of those having the right, be revoked, in order that the grant may be made in accordance with the statute; but such grant is no ground for revocation if the party applying therefor had notice of the original grant, either constructively in the mode prescribed by the statute, or actually in any method, or failed to apply within the time required by the statute, or actually renounced the right; nor can there be such revocation, except for cause otherwise, where the court has made the appointment in the exercise of its statutory jurisdiction in selecting one or more from a class equally entitled.

§ 227. **Effect of Renunciation or Waiver.** — If the person, or all of a class of persons, entitled by preference, have waived

or renounced their privilege, it becomes the duty of the court to appoint the one, or one or more of a class, having the next right, if there be such; the discretion to select between several equally entitled being governed by the same considerations as if no renunciation or waiver had occurred, limited, however, to the applicants before the court, because the court has no right to reject an applicant on the mere ground that there may be others equally entitled who are better qualified.

The right given by the statute cannot be delegated; the widow or any of those entitled by preference, may renounce their right, but when they do so, the power to appoint under the regulations of the statute, and the duty to exercise the discretion thereby conferred, is still in the probate court; hence the person renouncing cannot substitute another person and demand his appointment. But while the court is in no wise bound by the nomination of the party having renounced, yet the wishes and preferences of those whom the statute points out as the fittest persons to administer the estate will have great weight in guiding the discretion of the court.

Where the statute, as interpreted, does not prevent, it is usual where the husband, widow, or next of kin reside abroad, to grant the administration to the nominee of such relative. So a stranger may be appointed at the request of one who has himself the preference, if there be no others having preference over the stranger so appointed.

Agreements to transfer the right of administration from those entitled under the statute to other parties, for a consideration, — for instance, of receiving from such party the commissions to be allowed by the court, — are against public policy and will not be sustained; an agreement between two parties, both equally entitled, to take joint administration, and where the principal labor and responsibility would fall on one, that the other would take such portions of the commissions as his associate would think fair was held valid. But there can be no partnership in the office of administrator.

§ 228. **Administrators cum Testamento Annexo.** — The distinction between an administrator generally and an administrator *cum testamento annexo* is, as the name implies, and as has already been remarked, that the former distributes the effects

according to the law of descent and distribution, while the latter is bound in this respect by the provisions of the will. Since administration with the will annexed is granted only in default of an executor named in the will, it is necessary, before such grant can be made, that the court be fully satisfied that the executor named, if any, or where several are named, all of them, have renounced the trust, or are unwilling to serve, or incapable. No formality is necessary in making such proof, beyond the compliance with the statutory requirements on this subject; but it is necessary that the record show the renunciation, or waiver, otherwise letters *cum testamento annexo* may be declared void.

In granting letters *cum testamento annexo*, the court is governed by the same principles which determine the appointment of general administrators, chief among which is, that in the absence of regulation, the right to administer follows the right to the personal property. Hence residuary legatees are preferred, in the grant of letters *cum testamento annexo*, to the next of kin or widow; and this preference extends to the representatives of residuary legatees who survive the testator and have a beneficial interest, such representatives being entitled to letters *cum testamento annexo* in preference to the next of kin, unless otherwise determined by statute.

§ 229. **Administration of Estates of Non-Residents.** — The necessity of administration on the property of a non-resident in the sovereignty where it may be found, and the relation of such administration to that of the domicile of the deceased have been heretofore discussed. Since the law of the domicile at the time of an intestate's death governs the devolution of personal property, the selection of an administrator in an ancillary jurisdiction where property of the deceased may be found, will be affected to some extent by the law of the domicile. But in other respects there is no essential difference in the rules governing the grant of letters on the estates of deceased residents and non-residents. It has also been pointed out, that by the comity of States the person who obtains administration in the State of the domicile, or his attorney, is entitled to a similar grant in any other jurisdiction where the deceased has personal property, unless such person is disqualified by the law of the ancillary forum.

§ 230. **Administrators de Bonis Non.** — If a sole or all of several executors or administrators die, or resign, or be removed from office before the estate is fully administered, it becomes necessary to appoint an administrator *de bonis non* — simply, or with the will annexed, as the case may be — to complete the administration. The circumstances under which such letters are granted, as well as the powers and duties of the officers so appointed, have been fully considered in connection with the subject of administrators generally; it is sufficient, therefore, to recapitulate, in this connection, that there must be an estate remaining unadministered, and a vacancy in the office of executor or administrator, otherwise there can be no grant of letters *de bonis non*. The considerations governing the preference in ordinary cases govern also in respect of administrators *de bonis non*, whether of testate or intestate estates, except as otherwise indicated by statutory rules.

§ 231. **Administrators with Limited Powers.** — It will appear from a previous passage, that limited administrations may be granted under certain circumstances, although discouraged by courts and text-writers in America, because here the tendency is to commit administration at once to those who may be under no present disability, with full authority to complete the settlement of the estate without disturbing the course of administration by placing it in the hands of persons claiming a superior right. But the authority to appoint administrators *ad colligendum*, *ad litem*, *durante absentia*, *durante minore ætate*, or for some special purpose, is sometimes resorted to. The rules governing the court in selecting proper persons for appointment in such cases are necessarily different from those controlling the appointment of general administrators, because the fundamental principle of having the administration follow the right of property is inapplicable. The discretion of the court seems to be limited only by the bounds of propriety, and extends to any discreet, qualified person.

CHAPTER XXVII.

OF THE ADMINISTRATION BOND.

§ 232. **Origin of the Law requiring Administration Bonds.** — The English statute, requiring bond to be given to the ordinary upon committing administration of the goods of any person dying intestate, is incorporated into the statutes of every State in the Union. So great has at all times been the anxiety of legislators and judicial tribunals in this country to protect the just demands of creditors on the one hand, and to vindicate the lawful inheritance and dower to the widow and next of kin, on the other, and so appropriate and efficient in accomplishing this desired end is the administration bond considered to be, that not a single State has ever ventured upon the experiment of substantially changing the law in this respect. With few exceptions the law in the several States is uniform, requiring the administrator, whether with the will annexed, *de bonis non*, temporary, or permanent, to give bond with two or more sufficient sureties, in a sum at least double the value of such personal property as may come into his possession belonging to the estate of the decedent.

§ 233. **Bonds of Executors.** — But under the English law executors derive their authority from the will, and not from the grant of the ordinary, or probate court; hence in England executors are not required to give bond.

The English rule is followed in a few States. In most States, however, no distinction is made in the matter requiring bonds between administrators and executors, unless the testator expressly direct, by provision in the will, that the executors by him appointed shall not be required to give bond, in which case the desire of the testator is complied with, unless the court, upon complaint of some creditor, legatee, or other person interested, or even upon its own knowledge, suspect that the estate would be fraudulently administered or wasted, when it

is made the duty of the court to cite the executor to show cause why bond should not be given, and in its discretion compel it, or refuse letters.

It is obvious that the exemption in these States is based upon the testator's right to dispose of his property in the manner deemed best by him, saving the rights of creditors and of those having legal claims upon him; which includes the power to exempt from the necessity of giving bond, as a method of gift to the executor. From this it follows, that the exemption in such cases is personal to the executor named in the will, becoming inoperative on the failure or refusal of such person to accept the trust, and has no application to other executors or administrators. But in other States the requirement to give bond before an executor can lawfully take charge of an estate is as imperative and absolute as it is upon administrators.¹

§ 234. **Power of Court to order Bond.** — In those of the States in which an executor is permitted to administer without giving bond, whether the exemption arise under the statute or by express direction of the testator, his office is one of special trust and confidence, for which reason no bond is required of him. But if a court become satisfied that the executor, who was solvent when named in the will, is likely to become insolvent, and that there is danger that he may abuse his trust, or has ground to suspect that he will indirectly and fraudulently administer the estate to the prejudice of creditors or legatees, he will be ordered to give bond with sufficient surety to protect the estate. In such case any person who has an interest in the estate may interpose to move for an order requiring security.

§ 235. **Circumstances rendering Bond Necessary.** — It is not possible to define with accuracy the precise circumstances which should induce the probate court to demand sureties from an executor who is otherwise exempt under the law or the direction of the testator. Of these the probate judge must necessarily be the primary, and in most cases the sole arbiter, since an appellate court will not interfere with the exercise of his discretion unless his decision be plainly in conflict with the letter or spirit of the law. If the probate judge have reason to

¹ The States in which the varying views mentioned in this section are upheld are listed in Woerner on Administration, § 250.

suspect the integrity, the mental capacity, or even the financial ability of the executor, he should protect the estate and the interests of those concerned in it by an order requiring bond with sufficient sureties. The mere *poverty* of an executor, which existed at the time of the testator's death, without maladministration or loss or danger of loss from misconduct or negligence, does not authorize the requirement of a bond; nor the fact that an executor is not possessed of property of his own equal in value to that of the estate he is to administer, if there is no ground to fear that the trust funds in his hands are in danger from improvidence and want of pecuniary responsibility. But where other circumstances concur, and insolvency arises *after* the appointment by the testator, it may become decisive on the question of ordering security to be given.

§ 236. **Invalidity of Administration without Bond.** — Usually it is held that the failure of the administrator to give proper bond does not avoid the letters of administration, but only makes them voidable. The cancellation of the bond is held not to revoke the appointment *per se*. Of course the probate court has power to revoke the appointment for failure to give bond.

§ 237. **When Additional Bond may be ordered.** — Whenever it becomes apparent that the sureties of an administration bond have become insolvent, or that the penalty in the bond is in too small an amount, or that the bond is from any cause insufficient or inadequate, the executor or administrator should be ruled to give other or further security. For failure to comply with such an order, the executor or administrator may be removed from office by the judge of probate. Any person in interest may petition the probate court for an order to compel additional or better security, and on the trial of such motion it is sufficient that their interest be alleged under oath. As to the statement of facts necessary to authorize the probate court to order additional security, it is sufficient to refer to the provisions of the statutes upon the subject, which generally indicate the circumstances under which further or other security may be required with sufficient clearness. Insolvency, death, or removal from the State of the sureties, and inadequacy of the penalty, are the most usual. The insolvency of the principal

in the bond, while the sureties remain solvent, is no ground for increasing the amount of the bond.

§ 238. **Nature of Liability of Sureties.** — The liability of a surety on an administrator's bond is co-extensive with the liability of the principal in the bond.

The general rule appears to hold judgments against principals alone competent, but not conclusive evidence against the sureties, although it has also been held that such judgment is not evidence at all against the sureties. But since, by the terms of the administration bond, the refusal or neglect of the administrator to obey or comply with the judgment or decree of a court of competent jurisdiction constitutes in itself a breach of the bond, that judgment against the administrator alone must generally be conclusive evidence, and questions as to its force can rarely arise. Where the bond was not expressly conditioned to obey judgments, the admission has been upheld on the theory that sureties are the privies of the administrator, and precluded from questioning any lawful order made by the court having jurisdiction over the principal.

But the judgment, to bind the sureties, must self-evidently be one that is enforceable against the principal; unless there be a judgment to be satisfied *de bonis propriis*, the sureties are not liable; their liability does not arise until the default of their principal has been fixed. Hence sureties, though not parties to the record, nor beneficially interested in proceedings against executors or administrators, are allowed to appeal from judgments against their principals; and the Statute of Limitations runs from the decree or order fixing the liability, and not from the death of an administrator who dies before the estate is finally settled.

If there was fraud or collusion in obtaining the judgment, where the failure to comply with it constitutes the breach of the bond complained of, the judgment cannot be attacked collaterally in the suit on the bond, but must be set aside in a direct proceeding.

§ 239. **Ordering Further Bond.** — The court cannot relieve a surety from liability for the future save in pursuance of some statutory provision which must be strictly complied with.

It is obvious that the purpose of a new or additional bond

ordered by the court *ex mero motu*, or moved by some interested person for the better protection of the estate, or voluntarily given by the principal in anticipation of such an order, is to add the security resulting from the new to that afforded by the old bond. Hence the estate is protected, after the giving of the new bond, by both sets of sureties; those on the first bond remaining, and those on the second bond becoming, liable for any breach happening after the new bond is given. Where the condition of the bond is that the principal shall "account for, pay, and deliver all money and property of said estate," the sureties on the last bond are liable for the loss following any defalcation, conversion, or *devastavit* committed by the principal, whether before or after the giving of the last bond, because the non-payment after an order by the court having jurisdiction constitutes a distinct breach of the bond; the same result follows where the terms of the bond are to "do and perform all other acts which may be required of him at any time by law." In such case both sets of sureties are liable: the first, because the conversion or other misconduct leading to the loss of the assets occurred during the time when they were sureties; the last, because the non-payment constituted a breach while *they* were such.

The probate court everywhere has authority to order a new bond when the existing bond for any reason ceases to constitute the protection contemplated by the law. It can do this at the instance of parties interested in the estate, but sureties on a bond cannot call for another bond as substitutionary for theirs, unless the statute provides for such a proceeding, as is the case in many States.

There is an important distinction between further bonds given at the instance of sureties in an existing bond, and those given in the interest of the estate. When given under statute at the instance of sureties, it is often provided that the former bond is discharged from any misconduct of the principal after the new bond is accepted and filed. If given in compliance with an order of court in other cases, wherever it shall appear necessary and proper for the protection of the estate, the new bond is simply cumulative, and the old sureties remain liable for subsequent breaches by the administrator.

Before any order for a new bond can be made, there must be notice, or citation to, or appearance by the administrator or executor.

If upon revocation of the letters of an administrator for want of a new bond ordered on the motion of his surety, letters *de bonis non* be granted to the same person, the former sureties are thereby fully discharged, because the administrator and his successor are the same person, so that there can be no accounting between the old and the new administration, and it must be presumed that the administrator *de bonis non* has received from himself all the assets belonging to the estate.

§ 240. **Contribution between Different Sureties in the Same Estate.** — The contribution between sureties, and of subrogation, liability of sureties on different bonds in the same estate, etc., are matters hardly within the scope of this work and the reader desiring to pursue it is referred to the larger work.¹

§ 241. **Bonds given in Successive Trustee Capacities.** — It is sometimes of importance to ascertain in what capacity a principal, who has given bond as executor or administrator, and also as guardian, trustee, or other fiduciary, with different sureties, is chargeable with assets. In such case it is to be remembered that, where the obligation to pay and the right to receive are united in the same person, the law operates the appropriation of the fund to the discharge of the debt. Hence, where an administrator who is also guardian of a minor distributee, has made final settlement, and there is an order directing the payment of the distributive shares, such order will operate to charge him in his capacity as guardian, and relieve his sureties on the administration bond; but until such final settlement is made, or the assets accounted for, the former sureties remain liable.

But the efficacy of bonds cannot be permitted to be endangered or destroyed by applying this doctrine to the transfer of the mere indebtedness of a fiduciary from himself in one, to himself in another capacity, so as to exonerate his sureties in the former capacity, and either throw the burden on another set of sureties, or entail the loss on the beneficiaries, without some overt act manifesting the transfer of actually existing assets.

¹ Woerner on Administration, § 255.

§ 242. **Technical Execution of the Bond.** — The form in which bonds are to be taken from executors and administrators is generally prescribed by statute, and errors may be avoided by the exercise of ordinary care and attention on the part of the probate judge or clerk. In some instances, these bonds have been construed with technical strictness against the obligees, and held void as statutory bonds where they deviated from the statutory form; but the general rule is to construe them rigorously against the obligors, and with the utmost liberality in favor of the parties to be protected by them.

Errors and omissions in the bond can be controlled by other records in the case.

It is not the function of this work to go into the details of the subject of bonds, and if such are desired the reader is referred to the larger work on Administration.¹

§ 243. **Amount of the Penalty.** — The amount in which security is to be given is necessarily left to the discretion of the probate court, the statutes generally fixing a minimum only, below which the amount must not be ordered. In almost all States this minimum penalty is fixed at double the value of the personal property of any kind, including the proceeds of sale of real estate, where the power to sell is given by will, which may come into the hands of the executor or administrator by virtue of his office. The clerk and court taking the bond are required to satisfy themselves of the solvency of the sureties offered, and for this purpose may examine the sureties themselves, the principals, or any other person, under oath; and the bond should not be accepted unless signed by a sufficient number of sureties who appear to be perfectly solvent, owning property in excess of their debts and liabilities, and of what may be exempt from execution under the law; and the aggregate amount of the property so owned by the several sureties should equal at least the penalty of the bond. It is generally required that the sureties be inhabitants of the State; and certain classes of persons are in some States forbidden from being received as sureties on administration bonds. But such provisions are considered directory merely, and not designed to invalidate the bond where the law is disregarded.

¹ Woerner on Administration, § 256.

§ 244. **Joint or Separate Bonds.** — When there are several executors or administrators, they may, in some of the States, either give one joint bond, or each a separate bond. Where separate bonds are given, each must be in a penalty as high as that required for a joint bond, because each executor or administrator is lawfully entitled to take into possession and administer any or all of the assets, and the court cannot control them in this right.

At common law, under which executors were not required to give bond, an executor was not liable for the malfeasance of a co-executor, unless it could be shown that he had concurred therein, or that there had been joint possession of the estate, from which it would be inferred that one executor had yielded to the control of the other, who squandered it. The same rule is adhered to in America as to co-administrators and co-executors; the executor or administrator, *as such*, is not liable for waste committed by his co-executor, nor for assets which the latter received and misapplied, without his own knowledge or fault.

How far the giving of a joint bond affects the liability of one executor for the acts of the other is variously held, the subject being largely influenced by construction of local statutes. The mere giving of the joint bond has been held to be an agreement to join in all acts of administration, thus rendering each *qua* executor liable for the acts of the other under the law stated in the preceding paragraph, without reference to liability to suit on the bond. In most States it is held that the effect of giving a joint bond is to make the principals liable for each other as sureties as long as the joint administration continues. Developing this view, principals are held bound to protect the joint sureties from the effects of each other's acts. Under this view sureties would not be liable to one of the joint principals for default of the other. But in some States the doctrine that each principal is surety for the other is denied, and it is asserted that they are jointly liable for joint acts, and each separately liable for separate acts, because they signed as principals and not as sureties. The bond is analyzed into two bonds which are merely physically united. Under this view one executor could recover on the bond against the sureties for the default of the other.

§ 245. **Approval and Custody of Bonds.** — The administration bond must be approved and attested or certified by the court, judge, or clerk taking the same; if taken by the judge or clerk in vacation, it should be reported to and approved by the court at its next regular term; it should be recorded in a book kept for that purpose, and the original filed with the papers pertaining to the estate, and a careful compliance with the requirements of the statute with reference to the taking of bonds is the duty of judges and clerks. But, while the courts of some States require a strict and technical adherence to the directions of the statute, and hold bonds insufficient which are not taken in conformity therewith, these formalities are generally deemed to be directory only, and a variance from them in matters not essential to the nature of the contract of the sureties will not affect the validity of the bond. An administrator's bond is an official document, and cannot be removed from the office; if needed as evidence a certified copy is sufficient. If it as well as the record thereof is lost or destroyed, it may be substituted as the record of a probate court.

§ 246. **Special Bonds.** — In some States the administrator's bond does not cover liability arising for sales of real estate under order of court. A special bond is required. The subject is discussed hereafter in connection with sale of real estate to pay debts.

CHAPTER XXVIII. 1

OF THE PROCEDURE IN OBTAINING LETTERS AND QUALIFYING
FOR THE OFFICE.

§ 247. **The Petition for Grant of Letters Testamentary or of Administration.**—There was occasion in a former chapter to point out the diversity of decisions upon the question of the validity or conclusiveness of the judgments and decrees of probate courts, and to show that in some of the States these are assailable in collateral proceedings, and will be held void unless the record recites all the facts upon which the jurisdictional power of the court to render them depends. In these States the rule is stated to be, that the record must show the facts giving jurisdiction, or the judgment rendered will be held void. In the majority of States, however, the rule is less stringent, and jurisdiction will be either presumed or inferred from such facts as may be stated, or from the judgment or decree itself. So, for instance, the statement in the petition referring to the decedent as “late of” a county named, is held a sufficient averment of the decedent’s domicile in such county at the time of his death. Although the petition must be verified, and the averment of the applicant “to the best of his knowledge and belief” is insufficient, yet objection on this score cannot be made in a collateral proceeding, and does not avoid the surrogate’s jurisdiction.

But while it may not in all cases be absolutely necessary to support the jurisdictional power of the court by a recital of all the facts, yet it is of the highest importance that a record should be made of all facts and circumstances which call forth the judicial powers of the court. The petition of the applicant for letters affords the most convenient means for proper allegations, so that the finding upon it may constitute an adjudication of all the necessary facts. The averments should include, among other things, *first*, the death of the person whose estate is to be ad-

ministered, his place of domicile at the time of his death, and whether he died testate or intestate; *next*, if he left a will, that it has been admitted to probate, and the name or names of the persons nominated executors; *third*, if the application be for letters of administration with the will annexed, that no executor has been named, or that all so named have renounced, died, or are incompetent to serve, and the circumstances conferring upon the applicant the right to administer the estate; *fourth*, the names of the widow, husband, next of kin, or heirs, as the case may be; *fifth*, the nature of the goods, effects, or other estate left by the deceased, and its estimated value; *sixth*, if the application be for letters of administration generally, the relation or kinship between the deceased and the applicant; *seventh*, if the application be for letters *de bonis non*, the death, removal, or resignation of the former executor or administrator, or, if there were several, of all of them; *eighth*, if the decedent was at the time of his death a non-resident of the county, the existence of property within the county, or other circumstance showing the necessity of administration; and, *generally*, whatever facts may exist which, under the law of the State and the particular circumstances, may have a bearing upon the jurisdiction of the court to grant letters, the right of the applicant to be appointed, and the amount of the bond to be required, or whether any bond be necessary.

§ 248. **Notice to Parties entitled to administer.** — It has already been shown that letters granted to a stranger, or to one whose claim to the administration is inferior to that of another, will be revoked upon the application of one having a superior right, unless such applicant had been notified or cited before the grant was made. The grant to one of several parties having equal claims will not, as a general thing, be revoked for the want of notice, on the application of another, unless there be a statutory requirement to give notice or issue citation to all entitled; but it is evidently wise and just that notice should be given to all who are in the same degree of preferment, so that the most suitable person may be selected, and possible disqualifications or objections pointed out before the appointment is made. The petition of the applicant must, as already stated, show, among the other facts necessary to give the court jurisdiction, his

interest in the estate to be administered; on the same principle, one showing no interest cannot intervene or object to an appointment. And where the statute provides for citation, it must be served upon all of those having a prior right, who have not renounced, and must conform to the requirements of the statute. Failure to cite the widow, or the next of kin, is an irregularity, for which the letters may be revoked, but does not generally render them absolutely void; yet it has sometimes been held to avoid the administration. But one having such notice as would be conveyed by the statutory mode of service cannot complain that the statute was not observed; nor one who voluntarily enters an appearance.

All parties to whom citation or notice is given, or who have a beneficial interest in the estate to be administered, may appear and oppose the appointment of a particular applicant; and the interest giving such a person a standing in court may be shown at the hearing, without having been previously adjudicated.

The statute, in some of the States, prescribes a limitation to the right of granting administration in a given number of years after the decedent's death.

§ 249. *Nature of the Proceeding.*—The grant of letters is said to be a proceeding *in rem* in the strictest sense, and in a contest for the right of administration there are strictly no parties plaintiff or defendant. The applicants are all actors, some of whom may withdraw and others come in at any time during the progress of the cause, even after appeal. The decedent's property rights should not be litigated in such proceedings. Objections to the grant of letters will be heard from any person claiming under oath to be interested. If his right to appear is disputed, the question will be decided upon proof, and if it be found that he is a mere stranger, and not interested as creditor, heir, or legatee, he cannot be heard even to object that there are other persons having priority over the applicant under the law. The grant must be during the term succeeding the publication of notice and citation by the clerk, where such notice and citation are required; but the application may be continued from term to term by order of the court, without new notice; parties in interest are bound to take notice of such con-

tinuances; but if nothing is done in pursuance of the notice given and no continuance or postponement had, the notice given lapses and subsequent proceedings are void.

§ 250. **Nature of the Decree, and its Authentication.** — Letters testamentary or of administration can be granted only by the decree or order of the probate court in term time; but provision is made in most of the States, that during vacation letters may be issued by the judge or clerk of the court, which will be ratified by the court at the next regular term thereof unless valid objection be made against the appointee.

The delivery of letters is not necessary. Possession of letters by the person to whom they purport to have been granted, is *prima facie* proof of delivery; and the proper proof of appointment is the letters of administration or a certified copy thereof, or of the order of appointment.

§ 251. **Oath of Office.** — The oath of office which executors and administrators are required to take before entering upon the discharge of their duties is the decisive ceremony clothing them with the title to the personal property of the deceased testator or intestate, and all the authority and responsibility connected with their office. The refusal of an executor to take this oath is, even in England, tantamount to a refusal of the executorship, and must be so recorded. So the refusal to give bond and take the oath required by the law amounts to the refusal of the office of administrator. The form of the oath is usually prescribed by statute, and may be administered by the judge or clerk of the probate court; but this is not essential; it may be taken before any officer competent to administer oaths, and transmitted to the probate court. Unless they qualify, neither an executor nor an administrator has authority to act; what they attempt to do as such is void, or the act of an executor *de son tort*.

CHAPTER XXIX.

ON THE REVOCATION OF LETTERS TESTAMENTARY AND OF
ADMINISTRATION.

§ 252. **Conclusiveness of the Decree or Order granting Letters.**—Letters testamentary and of administration, granted by a court having jurisdiction for such purpose, are, while unrepealed, conclusive evidence of the authority of the grantees, and cannot be impeached collaterally, even for fraud, although they may be revoked or annulled in the method pointed out by statute to that end, in a direct proceeding, or by appeal. Until such revocation by the decree of a competent court, or appeal, it cannot be questioned in either a common-law or chancery court, and it follows that the acts of an executor or administrator are valid, even though the probate of the will or the grant of letters was erroneous, or obtained upon fraudulent representations, or under a forged will.

Letters granted by a court having no jurisdiction, being void, gain no validity by the mere lapse of time. Sales of real estate have been held void, and the purchaser for that reason held to have obtained no title, more than twenty years afterward. An appointment made by a court having no jurisdiction is a nullity; hence the appointment of another, by a court having jurisdiction, as administrator of the same estate, is good without formally annulling the first appointment.

§ 253. **Jurisdiction to revoke Letters.**—The power to revoke the authority of executors (which in England is usually termed the revocation of probate) and of administrators is in some States exercised by courts of equity, when they obtain jurisdiction over the executor or administrator, under the well-known rule, that, where a court of equity obtains jurisdiction for one purpose, it will retain it until full and satisfactory justice is rendered to all the parties concerned. Thus, in a case calling for the intervention of chancery, an executor may be

restrained from squandering and disposing of the property of his testator, and removed, or a receiver appointed; and an administrator may be removed. But where this authority exists in courts of chancery at all, it will be exercised in extreme cases only.

In most of the States, however, the power to revoke the letters granted, or, as it is more usually termed, to remove an executor or administrator, is vested exclusively in the probate courts; superior courts exercising, in such cases, appellate jurisdiction only, or granting the assistance of equity where the lower court is without the necessary power to accomplish justice.

§ 254. **Recall of Letters granted without Authority in the Court.**

— It is evident that the judgment or decree of any court is conclusive and binding upon the court rendering it, as well as against all the world. Hence, where the probate court has once regularly conferred the appointment, it cannot remove the incumbent except for causes recognized by the law as sufficient, and in the manner authorized by statute. But it is an inherent power in every judicial tribunal to correct an error which it may have committed, when no positive rule of law forbids it. It is, therefore, the duty of the court, upon the application of any party in interest, or even *ex mero motu*, to annul or revoke letters granted upon proof of the death of a person who subsequently appears alive; or where it is shown that there was no jurisdiction, the decedent being domiciled at the time of his death in another county, or that he was a non-resident of the State having no property therein, or that the will was admitted to probate through fraud or error, or that a later will or codicil should be admitted; or where a will is found to have been already probated, or is discovered after grant of letters of administration generally; or where an administrator with the will annexed is appointed in derogation of the executor's right, or one not preferred is appointed administrator before the expiration of the period during which preference is given by statute to others; or where administration is improperly granted, there being no estate to administer; or where it is granted to a person or by a judge disqualified, or by mistake to one not preferred, or who refuses to give bond; or where an administrator *de bonis non* was appointed while there was an acting executor

or administrator. In all of these cases the letters granted are either void — in which event it is the duty of the court to revoke, or rather to declare null, its appointment, so as to correct the record and prevent further mischief from being done, as soon as the true facts become known to it, whether by evidence, or otherwise — or they are voidable, and may be revoked upon the application of some person having an interest in the estate, and upon notice or citation to the person to be removed.

§ 255. **Theory of Removal for Cause.** — The grounds upon which an executor or administrator will be removed for cause are manifold, and are commonly designated in the statutes.

In the nature of things, a power which may be invoked in such a variety of instances must largely depend upon the discretion of the judge for its proper exercise. Such discretion vested in judges of probate is on the one hand not an arbitrary one, as at one time it was supposed to be in the ordinary at common law, who might repeal an administration at his pleasure, nor on the other is it so narrow as to prevent him from exercising it in furtherance of the paramount end and aim of the law, which is the safety and efficient administration of the estate. Where the appointment of an administrator is left to the unconditioned discretion of the judge, he will be controlled by such considerations in making the selection; but having made it, the appointee can be removed only upon proof of such facts as constitute a breach of the trust, in ascertaining which the judge may be aided by considering whether the conduct or acts complained of render the principal liable on his bond; since, as a general proposition, the liability of the surety arises only upon misconduct of the principal. And there should never be a revocation without due notice to the party, informing him of the matters alleged against him, and enabling him to defend.

Due notice, however, as far as the removal of the executor or administrator is concerned, as distinguished from the power to render a personal judgment against him, need not always be personally served. When he has left the State, notice by publication as provided by statute is sufficient. He submitted to that form of service when he accepted appointment under the statute.¹

¹ *Michigan Trust Co. v. Ferry*, 175 Fed. 667.

§ 256. What Misconduct justifies Revocation of Letters. —

There are numerous adjudications indicating the particular acts or line of conduct which require the removal from office of an executor or administrator, as well as those which do not justify the revocation of their authority. The most fruitful source of trouble and litigation is the unwarranted application of the trust funds to the private use of the executor, administrator, guardian, or curator, and one which but too often leads to their own financial ruin, as well as the destruction of the estates committed to their care. Absurd as it may appear, yet many of the cases under this branch of the law concern those who in good faith believe, and many more those who make a specious pretence of believing, that a guardian or administrator, having been appointed to take charge of an estate, and, it may be, given bond for its faithful administration, may legally treat the funds as their own, being liable only to produce them when the proper time shall arrive. An estate in the hands of such a person is not safe, and it would seem that he is "unsuitable to execute the trust reposed in him."

However, errors of judgment not amounting to malfeasance are not ground for removal. An executor may commit errors in his accounts, or make mistakes in his construction of the will; these the court will correct, but will not remove the executor, unless there is wilful misconduct, waste, or improper disposition of the assets.

Bankruptcy and insolvency may be good cause for the removal of an administrator, although it does not *ipso facto* impair his official authority; but poverty is not, unless the condition of the appointee has subsequently become changed.

The spirit in which courts exercise their judicial discretion on motions to remove executors and administrators can best be studied in illustrative cases.¹

§ 257. Who may move for Revocation. — Courts will not permit one who has no direct interest in the estate or who cannot be benefited by the order which he prays for, to prosecute for the removal of an executor or administrator. Hence it is re-

¹ Numerous authorities are collected in the text and notes of Woerner on Administration, §§ 270 and 271.

quired that in the petition or motion the interest of the party presenting it shall be stated, and wherein it has been or is about to be affected by the party to be removed. And it is not sufficient to charge mismanagement, misapplication of funds, or maladministration in general terms, but the facts must be stated which constitute the alleged cause for removal, and must be supported by affidavit. Nor will a motion for removal be heard in a collateral proceeding, but only by direct action, upon petition and citation, the service of which is a jurisdictional fact. Having appeared, however, he cannot subsequently object that he had no notice. The motion may be made by a creditor for the removal of an administrator who was appointed in contravention of the creditors' right within the time during which they have priority over strangers, or when he has been injured by the maladministration alleged; by the widow of the decedent; by a legatee under a will, when the judgment declaring it null has been appealed from; by the assignee of a devisee or legatee; by sureties conceiving themselves in danger from the conduct of the administrator; and, *a fortiori*, by any of the heirs of a solvent estate. But only next of kin may contest the appointment of an administrator on the ground that he is not next of kin. One not of the next of kin has no right to ask for the removal of the authority of the public administrator. One whose appointment as administrator is void because an administrator had already been appointed by a court whose appointment was voidable but not void, has no such interest in the estate as to enable him to move for revocation of the voidable appointment. Where a non-resident is disqualified, he is incompetent to petition for the revocation of letters granted to others. The creditor of an executrix, but not of the testator, has no interest in the estate. If the application for the removal is on the ground of premature appointment, it must be made within such time after the party in priority learns of the appointment as the statute gives him originally after the death of the intestate.¹

It seems that any person interested in the estate may prosecute for the removal of an executor or administrator, independ-

¹ The cases on which the illustrations in this section are based are cited in Woerner on Administration, § 272.

ently of other parties having a like interest, unless the court should require such other parties to be brought in.

§ 258. **Resignation of Executors and Administrators.** — At the common law, any act of intermeddling with the effects of an estate by the person nominated as executor bound him as an acceptance of the executorship, and he could not subsequently renounce his character as executor, nor resign the trust. So with regard to the office of administrator; the probate court has no power to accept the resignation of an administrator once duly appointed and qualified, without statutory authorization. But where the common law as thus stated is in force, the courts in several cases have treated an accepted resignation as the substantial equivalent of a removal by the court.

It is now generally provided by statute in the several States, that for reasons deemed sufficient by the probate court it may accept the resignation of an executor or administrator, and relieve him, after settlement of his account, from the trust.

The right to resign is not, however, an absolute or arbitrary right; it can only be accorded upon proof of circumstances showing it to be consistent with the interests of the estate. Hence the parties interested in the estate should have notice of the intended resignation, either by publication or otherwise.

§ 259. **Consequences of the Revocation of Letters.** — The most important distinction to be considered in determining the consequences of the revocation of letters is between grants which are void, and such as are merely voidable, — the mesne acts of an executor or administrator between the grant and its revocation being, in the former case, of no validity, and in the latter protecting those acting in reliance thereon. The necessity of this rule is self-evident: a void grant is no grant, and acts depending for their validity upon official authority in the actor are wholly void in the absence of such authority, while on the other hand acts before revocation, under an appointment merely voidable — that is, one good until revoked — are entitled to full protection.

The cases giving rise to the application of this principle in America turn mostly upon the question of the residence of the decedent at the time of his death; for it was formerly held in many States, that the probate court has no jurisdiction to

grant probate or letters unless the decedent died an inhabitant of the county, or leaving property therein, and that letters granted where such was not the fact, and all acts done upon the authority thereof, are void. This doctrine, as we elsewhere have seen, is now very generally giving way to the safer one of holding them voidable, but good until revoked.

So, also, the discovery of a will will not make void letters of administration granted generally; but until revoked all persons acting in good faith with the administrator will be protected.

If the grant is only voidable, another distinction is taken between a proceeding by citation to revoke the letters granted, and an appeal from the judgment of the court of probate, which is taken to reverse a former sentence. The appeal suspends, until its termination, the powers of the person against whose appointment it is taken, and all of his intermediate acts are ineffectual.

A revocation upon citation, where the grant of letters was voidable only, leaves all lawful acts done by the first administrator valid and binding, as though his authority had not been questioned. This is self-evident, and it would be a waste of time and space to examine the very numerous cases so holding.

Since the removed executor or administrator has no further authority to act, or bind the estate, he cannot be held liable for any act affecting the estate after his removal. To a suit pending against him at the time of his removal he may plead the revocation of his authority in bar, at least if he has settled his account; and such suit must be further prosecuted in the name of a new representative of the estate, or be dismissed. Hence a decree for the sale of lands to pay debts, on application of the decedent's creditors, is void, if the administrator's resignation has been accepted before the rendition of the decree. After revocation, removal, or resignation, the former executor or administrator cannot complete a sale which he has been negotiating on behalf of the estate, nor collect assets; but the court has jurisdiction to settle his accounts as though he were still in office.

PART III.**OF THE PROPERTY TO WHICH THE TITLE OF EXECUTORS
AND ADMINISTRATORS EXTENDS.**

THERE is no occasion to repeat citation of authorities on the proposition that, at common law and in all the States, all mere personal property, including chattels real, goes to the executor of a testator, and to the administrator of an intestate or of a testator in case no executor accepts or qualifies. How far the widow and children of the deceased take by priority of title to the personal representative has already been discussed.

CHAPTER XXX.

OF PROPERTY IN POSSESSION.

§ 260. **Heirlooms not Personalty.** — By special custom heirlooms go to the heir or devisee, and although they are mere chattels, cannot be devised apart from the realty.

Heirlooms in the strict sense are said to be rare, and seem not to be recognized in America; they are, according to the ancient authorities, such goods and chattels as, though not in their nature heritable, have a heritable character impressed upon them. This subject is not of sufficient importance in this country to justify further consideration here.

§ 261. **Disposition of the Corpse.** — No one has property in its strict sense in the corpse of the deceased: neither personal representative, surviving spouse, nor next of kin. But the personal representative has title to the burial clothes and may sue for any injury thereto. After the burial the surviving spouse or next of kin has a legal interest in the grave and the gravestone or monument which courts will protect. But, though there is no property in the corpse, the courts fully recognize the duty of disposing of the body in a decent manner, and the right of the proper person to control such disposition. The right of an individual to make a valid and binding disposition of his own body after death is recognized, which the probate court and representative may enforce as any other testamentary provision.¹ In the absence of such provision and of a claim of the burial right by others, the duty as well as the right is with the personal representative of the deceased. But he cannot act as against either surviving spouse or next of kin. As between these two the superior right of the next of kin to control the sepulture is asserted in some cases, while the widow is given the preference in others. The proper expenses incident to burial are in any event a charge against the estate.

¹ O'Donnell v. Slack, 123 Cal. 285.

§ 262. **Joint Property.** — It is one of the characteristics of joint ownership of property, personal as well as real, that, when one of the joint owners dies, his interest passes at once to the survivor or survivors, excluding the personal representatives as well as heirs and distributees from any title therein. But in equity, the owners of a mortgage made to several mortgagees jointly were held to be owners in common of the money secured thereby, the right to which, on the death of one of them, passes to his executor or administrator. From this principle the rule is deduced that at law the right of a joint owner passes, on his death, to the survivor or survivors, but in equity to his executor or administrator.

The result of the death of a partner on the joint ownership, which has been previously discussed, furnishes an illustration of this principle.

§ 263. **Real Estate.** — The general rule is that in the absence of statutory provisions the real estate, or lands, tenements, and hereditaments, of a deceased person, go directly to the heirs or devisees. Exceptions to this rule are enacted in many States whose statutes direct that realty and personalty are alike subject to administration; in the others real estate is likewise subject to be administered in case it becomes necessary, from the lack of sufficient personalty, to pay the decedent's debts, so that in these States the realty descends to the heir or devisee subject to a naked power to be sold on the happening of the contingency named. It is also to be mentioned here that executors, and under some circumstances administrators *cum testamento annexo*, are sometimes vested by will with power to dispose of real estate. In this respect it is sometimes difficult to decide whether the devise is to the executor, or to the devisee with a naked power in the executor. The question is to be determined by ascertaining from an examination of the entire will of the testator what his intentions were.

§ 264. **Chattels Real**, which, as already remarked, go to the executor or administrator, include all leases of lands or tenements for a definite space of time, measured by years, months or days, or until a day named; also estates at will, by sufferance, and, generally, any estate in lands not amounting to a freehold.

By statute in some of the States leases exceeding a given number of years, or certain other interests, which at common law would be personalty, are to be treated as real estate with reference to the rights of the administrator.

§ 265. **Chattels Real of the Wife.**—It is familiar doctrine that at common law the wife's interest in her chattels real may be divested by the husband at any time during coverture. But he may permit them to remain *in statu quo*, and if in such case the wife survive, they are hers to the exclusion of his executors and administrators, unaffected by testamentary disposition or charge. The disposition by the husband, in order to divest his wife's interest in chattels real, must, as a general principle, be such as to effect a complete change of the interest held by husband and wife jointly.

If the husband survive, he is entitled to his wife's chattels real not disposed of by him during coverture, and of which he had possession *jure uxoris*; not as her executor or administrator, but by right of survivorship. Hence, if he should himself die without having administered on the wife's estate, her chattels real go to his executor or administrator. The foregoing statement of the common law is materially altered by statute in almost all States.

§ 266. **Mortgages**, as well as deeds of trust to secure the payment of debts to the decedent, always go to the executor or administrator, even though the estate was in process of foreclosure at the time of the testator's death and although the heirs obtained possession before the appointment of an administrator. So, also, the real estate acquired by an executor or administrator in satisfaction of a judgment for a debt due the deceased is held by him in trust until it appears that it is not needed to pay debts or expenses of administration, when the title passes to the heirs. The equity of redemption in the mortgagor descends to his heirs. Hence it is usually held that, while the surplus proceeds of a sale during the lifetime of the mortgagor constitute personal property going to the executor the surplus of a sale after his death represents real estate and goes to the heirs.

But, obviously in such States as give the administrator custody of the real as well as of the personal estate, the surplus

arising out of foreclosure after death must also go to the personal representative.

The vendor's lien for unpaid purchase money, being a chose in action, goes to the executor or administrator, and not to the widow or heirs as such.

§ 267. **Chattels Animate.** — Domestic animals, being personal property, go to the executor or administrator. Of animals *feræ naturæ* only such go to the personal representative as are confined, or in the immediate possession of man; such as tame pigeons, deer, rabbits, pheasants, partridges, etc.; or animals kept in a room, cage, or the like; fish in a box, tank, or net; doves in a dove-house; or animals wounded so as to prevent their escape, or killed; or oysters artificially planted in a bed clearly separated and marked out for the purpose. But animals *feræ naturæ*, in so far as they belong to a privilege connected with landed possession, such as deer in a park (not so tame or reclaimed from their wild state as to become personal property), fish in a pond, and the like, will go to the heir, if the deceased held a freehold estate, or to the executor, as accessory to the chattel real, if he held a term for years.

§ 268. **Chattels Vegetable.** — Chattels vegetable, being the fruit or other parts of a plant when severed from its body, or the plant itself when severed from the ground, go to the executor or administrator. But unless they have been severed, trees and the fruit and produce therefrom follow the nature of the soil upon which they grow, and when the owner of the land dies they descend to the heir or person entitled to the land. But even growing timber, trees, and grass may, under special circumstances, become chattels, and as such pass to the executor or administrator; where, for instance, the owner of the fee grants the trees on land to another, they become personalty. Or the owner in fee simple may sell the land and reserve the timber or trees, and they thereby become personalty and go to the personal representative.

§ 269. **Emblements**, as against the heir, belong to the executor or administrator. The term includes every product of the earth yielding an annual profit as the result of labor and manuring; such as corn, wheat, grain, hops, saffron, hemp, flax, melons, of all kinds, and the like. But roots, such as carrots, parsnips,

turnips, skerrets, etc., are said to belong to the realty, because it is not right that the executor should "dig and break the soil," except potatoes, which are held to come within the description of emblements. The reason of the rule is, that where the occupant of land has sown or planted the soil with the intention of raising a crop, and his estate determines without his fault before harvest time, he should not lose the fruit of his labor; to accomplish which the law gives to him, or, if the tenancy is ended by his death, to his executors or administrators, the profit of the crop. Hence the right is confined to that kind of crop which actually repays the labor by which it is produced within the year, excluding fruit-growing trees and growing crops of grass, clover, etc., though sown from seed, and though ready to be cut for hay. While the executor or administrator of the tenant in fee is always entitled to emblements as against the heir, he has no such claim against the devisee at common law, although this distinction has in a few States not been upheld. That the administrator is not entitled to the growing crop sown and planted after the intestate's death seems a self-evident proposition; but whether a crop so sown goes at the administrator's sale of the land for the payment of the intestate's debts to the purchaser, is another question, on which different conclusions have been reached.¹

So it is self-evident, that where a widow or minor children are entitled by statutory provision to the product of the homestead and messuages, the executor or administrator is excluded.

In America the subject of emblements is regulated in many States by statute. In most of them it is provided, that if the owner die between the last day of December and the first day of March, emblements go to the heir; but if he die after the first day of March, emblements severed before the last day of December following are assets in the hands of the executor or administrator.

The widow is entitled to the crop, growing on the land assigned to her as dower, "she being then in *de optima possessione viri*, above the executor." So if she, as dowress, sow the land and

¹ That the purchaser does not take is held in *Barrett v. Choen*, 119 Ind. 56, 59. That he does take is held in *Powell v. Rich*, 41 Ill. 466, 469; *Footte v. Overman*, 22 Ill. App. 181, 184; *Page v. Culver*, 55 Mo. App. 606, 610.

marry, the crop will go to her on the husband's death in preference to his executor or administrator; but if she marry, and her husband sow the land and die, the crop will go to his executor; for it is well established that, upon the termination of a freehold estate held by the husband in right of his wife, the emblements will go to the husband or his representatives.

It is hardly necessary to add, that where the law gives emblements, it also gives the right of entry, egress, and regress so far as may be necessary to cut and remove them.

§ 270. **Fixtures, as between Heir and Personal Representative.** — Fixtures are annexations of chattels to the freehold which may, according to concomitant circumstances, assume the character of either real or personal estate. In its technical sense the word signifies such things only of a personal nature as have been annexed to the realty, and which may be afterward severed or removed by the party who united them, or his personal representatives, against the will of the owner of the freehold; but it is often used indiscriminately in reference to those articles which are not by law removable when once attached to the freehold, as well as those which are severable therefrom. Questions concerning fixtures are divided by text-writers into such as arise between, 1st, vendor and vendee, including mortgagor and mortgagee; 2d, heir and personal representative; 3d, landlord and tenant; and 4th, executor of tenant for life and reversioner or remainderman. The subject in hand demands the consideration chiefly of the second and fourth classes; the others will be noticed only in so far as they furnish principles or rules applicable to all.

In determining whether such personal property can be removed from the realty, intention is the controlling test. But for determining that intention there are several subsidiary tests and presumptions. As these approach the question from different standpoints, having little logical connection with one another, there is apparent conflict in concrete decisions, depending on the importance attached to one or the other of these considerations, though the separate principles are clear enough.

• 1. The test of physical attachment is important. If a personal chattel is so affixed to the freehold as to be incapable of being detached therefrom without violence and injury to the freehold, it goes with the real estate. But the chattel can be

come realty without physical fastening to land, as for instance a huge statue in the open air, kept in place by gravity solely. Pictures, mirrors, etc., taking the place of wainscoting belong to the realty; for "the house ought not to come to the heir maimed or disfigured."

2. But personalty passes with the realty without permanent physical attachment when there is constructive attachment: that is, when the portable chattel is specially adapted to the use of the realty in question. That keys, doors, windows, bolts, rings, etc., belonging to a house, though temporarily detached therefrom, belong to the realty, is self-evident.

3. On old and well-established rules the courts have declared trade fixtures personalty, though affixed to the soil in a manner that would make them realty under other tests. The doctrine was later applied to agricultural fixtures, and finally to fixtures for domestic use and convenience.

4. Another consideration is the adaptability of the article in question to the uses to which the realty is put. Manure from the barn-yard of a homestead, although neither rotten nor incorporated with the ground, but in a pile for future use, belongs to the realty; but manure made in a livery stable, or in any manner not connected with agriculture or husbandry, is personalty, and goes to the executor. A fence enclosing a field, of whatever material or construction, whether having posts inserted in the ground or not, is part of the freehold; nor does it cease to be so, though accidentally or temporarily detached therefrom without intent on the part of the owner to divert it permanently from its use; but rails in stacks, not having been used for a fence, are personalty. On the same principle, hop-poles, necessary in cultivating hops, are part of the real estate, though taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising. The second proposition above, though historically independent, is logically an application of this rule.

5. Again, since intent is the governing test, the interest which the owner of the chattel has in the realty must be an important element in determining whether or not it was contemplated that the chattel should become a permanent part of the realty.

The maxim, *Quicquid plantatur solo solo cedit*, is said to apply with most rigor in favor of the inheritance, and against the right of the personal representative to disannex therefrom and consider as a personal chattel anything which has been affixed thereto. Anciently there seems to have been no exception between the executor and heir of the tenant in fee to the rule that whatever was affixed to the freehold descends to the heir, but modern cases, while still attributing great force to this consideration, do not refuse to weigh the other elements of the case from which the controlling intention is to be found.

On this same principle there is, as between landlord and tenant for years, a leaning toward permitting the tenant to remove the chattel as personalty.¹

§ 271. Fixtures as between Devisee and Personal Representative.

— As between devisee and executor, the rule is that a devisee shall take the land in the same condition as it would have descended to the heir; hence he is entitled to all the articles affixed to the land, whether annexed before or subsequent to the date of the devise. The executor is therefore entitled to all the fixtures as against the devisee, that he would be entitled to as against the heir. But there seems to be no doubt that if, from the nature and condition of the property devised, it is apparent that the testator intended the fixtures to go with the freehold to the devisee, they will pass to him, although of a character which would go to the executor as against the heir.

§ 272. Fixtures as between Personal Representative of Life Tenant and Remainderman. — Since the heir is more favored in law than the remainderman or reversioner, in this respect, or rather, since the law is more indulgent to the executor of the particular tenant than to the executor of the tenant in fee, it follows that all the authorities which establish the executor's right to fixtures as against the heir will apply *a fortiori* against the remainderman or reversioner. As between landlord and tenant, there is great deviation from the rule, that what has been once annexed to the freehold becomes a part of it, and it would be erroneous to conclude that, because a fixture set up for ornament or domestic convenience has been decided to be

¹ Numerous authorities on the subject of this section are collated in Woerner on Administration, §§ 283 and 284.

removable as between landlord and tenant, therefore such fixture may be claimed as personalty by the executor of a tenant for life, etc.; still, there is much similarity between the two classes, and although the case of a tenant for life is not quite so strong as that of a common tenant, yet the reasoning is closely analogous between them. It is obvious that the executor and administrator of a tenant take the same property in fixtures, as against the owner of the fee, or the reversioner, as the testator or intestate had therein; and that the legal right of a tenant to remove fixtures may be governed by express stipulation, usually inserted in a lease for this purpose.

§ 273. **Separate Property of the Wife.** — The law in regard to the separate property of married women has of late undergone great changes, both in England and America; there has been and still is a strong tendency in both countries to supersede the common-law rules on this subject by the principles of the civil law, and to accord to married women as a legal right what formerly they could enjoy only under the ægis of a court of equity. It is necessary, therefore, to remember, that in all cases where by statutory provision property of a married woman is secured to her against the power or control of the husband, it will survive to her after his death, and the husband's executor or administrator has no title thereto; and if the husband survive the wife, such property will go to her executor or administrator, and the husband has no interest therein unless he administer on her estate, or take the property by virtue of some statutory provision. But at common law the husband is entitled to and becomes the owner of all chattels which the wife owned before marriage, or which come to her during the existence of the marriage, whether she survives him or not; and consequently, though she survive him, they will go to his executor if he makes a will, or to his administrator if he dies intestate. But if property be conveyed or bequeathed to or settled upon her, through the intervention of trustees, or even without, for her separate use, it will not, upon his death, become a part of the beneficial estate of his executors or administrators.

§ 274. **Ante-Nuptial Settlements.** — Ante-nuptial settlements of money, jewels, furniture, or other movables, by the husband upon the wife, are valid against the husband and all claiming

under him, as well as his creditors. The title of the wife is good, even against creditors, and *a fortiori* against the executor or administrator, although the settlor contemplated defrauding his creditors, if the future wife had no notice and did not participate in the intent. She stands as a purchaser, the marriage being a valuable consideration. So an agreement before marriage, in writing, that the wife shall be entitled to specific parts of her personal estate to her specific use, will be enforced in equity, although the legal title be vested in the husband by the subsequent marriage; the husband in such case becomes trustee for his wife's separate use, and the trust will bind his executors and administrators.

§ 275. **Post-Nuptial Settlements.** — Post-nuptial settlements, as well as gifts by the husband to the wife during coverture, are valid against himself and all who claim as volunteers under or through him, and even against creditors, unless fraudulent as to them or not made for valuable consideration. Where the settlement after marriage is made for a valuable consideration, the presumption of fraud fails, though the husband be indebted at the time. A contract in consideration of the settlement of existing differences, and the avoidance of future difficulties and dissensions, or of the return of a wife who is legally justified in her absence from the husband, is founded on a valid consideration. In the case of *Lloyd v. Fulton*,¹ Mr. Justice Swayne, delivering the opinion of the Supreme Court of the United States, lays down this rule upon the subject of post-nuptial marriage settlements: "Prior indebtedness is only presumptive, and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test."

§ 276. **The Wife's Savings from Separate Trade, Pin-Money, Gifts, etc.** — A wife may also acquire separate property by carrying on a business or trade on her own account, by permission of the husband, either in consequence of an express agreement between

¹ 91 U. S. 479, 485.

her and her husband before the marriage, in which case it will be binding also against creditors, or where he consents during the marriage, in which case it will be void against creditors, but binding on him and his personal representatives. And the savings of the wife arising from her separate property, gifts from the husband to the wife, pin-money, and similar allowances to her, or jewels or other things purchased by her out of her separate estate, belong to her, and do not constitute assets in the hands of the husband's executor or administrator.

But in the United States there is little or no occasion for the application of any rules concerning pin-money; this subject, as well as that of paraphernalia, is generally merged in, and governed by, the statutory provisions for the protection of married women and the support of the family upon the death of the husband.

§ 277. **The Wife's Paraphernalia.** — Paraphernalia of the wife include her wearing apparel and ornaments, suitable to her station in life. It is held in England that what constitutes paraphernalia is a question to be decided by the court, depending upon the rank and fortune of the parties; and the books are full of cases distinguishing between the nature and value of the jewels, ornaments, and garments as constituting, or not, the wife's paraphernalia. In America, as with regard to the analogous subjects of pin-money and other allowances by the husband, the statutes of most States contain specific, and in some cases very minute, provisions on the rights of the wife and widow to her paraphernalia, which are considered, in their connection with the estates of deceased persons, in a separate chapter. At common law, gifts as paraphernalia are distinguishable from gifts by the husband for the wife's separate use in this, that she may dispose of the latter absolutely, but can neither give away nor bequeath the former by her will; and that the husband may sell or give them away during his lifetime, but cannot during her life dispose of them by will. So they are liable, at common law, and in States in which they are not secured to the wife by statutory enactment, for the husband's debts, but not to satisfy the husband's legacies. Nor are jewels and other gifts in the nature of paraphernalia by third persons, *for her separate use*, liable for the husband's debts.

CHAPTER XXXI.

TITLE OF EXECUTORS AND ADMINISTRATORS TO CHOSSES IN ACTION.

§ 278. **Survival of Actions at Common Law.**—The ancient rule of the common law, *Actio personalis moritur cum persona*, left only such actions to be brought by the executor or administrator as were founded on some obligation or duty, including debts of all descriptions, with respect to which the executor or administrator is the only representative of the deceased recognized by law, so that no provision in a contract, nor any stipulation or agreement, can transfer to another his exclusive rights derived from such representation. Actions for injuries to the person or property of another, for which damages only could be recovered (tort, malfeasance, misfeasance), or arising *ex delicto* (trespass *de bonis asportatis*, trover, false imprisonment, assault, battery, slander, deceit, diverting a watercourse, obstructing lights, escape, etc.), in which the declaration at common law imputes tort to person or property, and the plea is not guilty, are said to die with the person *by* or *to* whom the wrong was done. This rule was modified by a series of English statutes, notably that of 4 Edw. III. c. 7, giving an action *in favor of* a personal representative for injuries to personal property, and 3 & 4 Wm. IV. c. 42, § 3, giving an action in favor of personal representatives for injuries to real estate, and *against* personal representatives for injuries to real or personal estate; so that actions are now maintainable by and against executors and administrators in all cases where the value of personal property has been reduced by injury thereto, whatever form of action may be necessary to secure the remedy, and for injury to the real estate, and the damages recovered declared to be personal estate.

§ 279. **Reason of the Rule.**—The accurate and logical import of the rule that *actio personalis moritur cum persona*,

seems to be, that for injuries to the person alone, not affecting property of any kind, the remedy ceases upon the death of the doer or sufferer. Legislative enactments, both in England and, with few if any exceptions, in America, spring from a recognition of the maxim in this sense, and the judiciary in both countries, when not controlled by statutory enactment to the contrary, is guided by it in its rulings. The law exacts reparation from the wrongdoer, whether the wrong affects the person or the property of another; it makes compensation by a judgment in favor of the person aggrieved against the aggressor, in a sum of money deemed to be the equivalent of the injury suffered. But, under the artificial common-law system respecting the devolution of property upon the owner's death, there can be no reparation for a wrong done (the remedy for which is an action *ex delicto*) where one of the parties is dead; "for," says Blackstone, "neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury." Actions arising *ex contractu* were allowed to survive both to and against executors and administrators, "being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before."¹ In this view no action lies against or by an executor or administrator for a tort committed to one's person, feelings, or reputation.

But an injury to property involves a wrong to others beside the immediate sufferer, that is to say, to all who have, from their relation to the owner, an interest in the property; and these, whether personal representatives, heirs, or devisees, are entitled to and have their remedy. Thus, as heretofore mentioned, personal actions survive in all cases arising *ex contractu*, and by English statutes this is extended to actions for injury to personal or real estate.

No action for a wrong done by the deceased against the personal representative lies unless the estate in his hands was benefited by the tort; in which case the tort can be waived and action brought in *assumpsit*. This is well illustrated by two cases of wrongful collection of taxes by an internal revenue collector,

¹ 3 Blackstone 302.

who died pending the suits. In *Patton v. Brady*,¹ the court held the personal representative liable on assumpsit; but in *Bank v. Brady*,² the claim was below the jurisdiction of the court in assumpsit, and viewed as a suit sounding in tort it was held not to survive.

§ 280. **American Statutes regulating the Survival of Actions.** — The tendency of legislation in America, wherever it diverges from the common-law rule above mentioned, is uniformly in the direction of increasing the liability of tortfeasors and their estates, and correspondingly augmenting the authority of executors and administrators to maintain action for injuries to the person or property of their deceased testators or intestates.

These laws vary greatly. Georgia, for instance, declares that no action abates by reason of the death of either party to a pending suit, leaving the right of the personal representative to institute suit as at common law; while the Missouri statute allows all causes of action to survive, except slander, libel, assault and battery, false imprisonment, or actions on the case for injuries to the person. In every State it is not only a question of the statute, but of the interpretation given it by the courts of the State.³

§ 281. **Actions for Injury to Personalty.** — It results from the preceding sections, and from the general rule that personal property descends to executors and administrators, that they alone can sue and be sued upon all personal contracts. The same principle extends to the recovery of specific personal property belonging to the decedent, upon whose death the legal title vests at once in the personal representative; and to the recovery of its value if it has been converted, or of damages for injury thereto. This has been held to include actions in trover, replevin, trespass, case, debt for conversion, and, *a fortiori*, for a conversion after the intestate's death, though before the appointment of the administrator. So, also, an action against a sheriff for a false return, and an action by a husband against a carrier for the loss of his wife's services and expenses paid in

¹ *Patton v. Brady*, 184 U. S. 608.

² *Bank of Iron Gate v. Brady*, 184 U. S. 665.

³ Classification of such statutory provisions is given in Woerner on Administration, § 292.

consequence of injuries received by her through the carrier's negligence; but all right of action for the loss of her society and its comfort to him dies with him.

§ 282. **Actions concerning Realty.** — Any contractual right accruing to the owner of the freehold goes to the personal representative. It is he, not the heir, who recovers rents accrued during the landlord's life. So the administrator sues on a bond for the payment of such rent. For injuries done the freehold during the owner's life, the personal representative sues, wherever the statute lets such tort actions survive, as is almost everywhere the case. The administrator can maintain replevin for trees wrongfully cut from the testator's land during his lifetime, and recover damages for injury to the rental value or for trespass committed upon the land before the death of the owner.

As to covenants of title the question is when they are broken. If broken during the owner's lifetime, the cause of action is in the personal representative, not in the heir or other successor to the title to the realty. As to covenants which run with the land, such as warranty and the covenant for quiet enjoyment, the cause of action is in the owner at the time of the breach, not in the personal representative of the covenantee. But as to covenants not running with the land, such as the covenants of seizin and of good right to convey, which are said to be broken, if at all, as soon as made, the cause of action was complete in the covenantee, and therefore passes to the personal representative, even though the assertion of the adverse title — the discovery of the fact that there was a breach — occurs after the death of the covenantee. But in an increasing number of States the courts, conceding that there is a technical breach of such covenants as soon as made, nevertheless hold that these covenants run with the land until the assertion of the outstanding title; and accordingly vest the cause of action in the holder of the covenantee's title at the time of such actual, substantial breach.

Where the estate of the deceased in the land was not a freehold, so that it descends as a chattel, the executor or administrator may self-evidently bring action of forcible entry and detainer for an entry, or sue for a trespass committed thereon,

either before or after the decedent's death, or sell or otherwise dispose of the right. And while it is clear that, for any injury to lands descending to heirs or devisees after the ancestor's or testator's death, the heirs or devisees alone can sue, and that the executor or administrator can bring no possessory action in such case; yet where, under the statute or a testamentary provision, the executor or administrator is put in charge of the real as well as of the personal estate, any action necessary to protect the same against wrongdoers, or to recover damages for injuries thereto, including ejectment for possession, must lie in favor of such executor or administrator. So the action of ejectment is given where land becomes assets for the want of sufficient personalty to pay debts, or under license from the probate court. And on the same principle an action on street assessment is maintainable *against* the executor or administrator, if he is in charge of the property assessed.

§ 283. **Actions for Injuries to the Person.** — All claims for injury to the person are lost at common law when either the injured party or the offender dies. But no State has failed to modify this rule by statute. Any given case presents a local question depending on the statute and its interpretation. Thus rulings, always resting on statute, can be found keeping the cause of action alive after death of plaintiff or defendant when the injury arose from a defect in a highway, a carrier's negligence, assault and battery, malicious prosecution, libel, slander, seduction, malpractice of a physician. And in each of these cases decisions to the contrary may be found under the statutes of other States. For these and other instances the statutes of the respective States must be consulted.¹

§ 284. **Actions for Injuries resulting in Death do not lie at Common Law.** — But in England and most of the American States actions are authorized by statute for the wrongful act, neglect, or default of any person or corporation resulting in the death of the person injured.

The action is in nearly all of these States intended for the benefit of the widow; in most of them for the benefit of the widow, children, or next of kin, or for the widow and next of kin; in some, for the husband, widow, and heirs; in others, if

¹ Authorities are collected in Woerner on Administration, § 294.

there be no widow, to children, or half to the widow and half to the children, or to be distributed among wife, husband, parent, and child. In some of the States the action may be brought by the widow, husband, parent, or other person entitled to the proceeds; but generally the suit is brought by the personal representative for the benefit of the persons named in the statute, not as representing the estate in such cases, but the persons for whose benefit the remedy is given. Hence the amount recovered is not assets in the hands of the executor or administrator; if the persons for whose benefit the action is authorized are not in existence, the statutes of a few States provide that the amount recovered shall be assets; but in most others it is held that in such case the action does not lie.

In nearly all the States where the question has arisen the benefit of these statutes is not withheld because of the fact that the beneficiaries are non-resident aliens.

In some of the States it is held that the husband has no action for the killing of his wife. In several States the statute is construed as abating the action by the death of the defendant; and there it is held that no action survives *against* the representatives of the wrong-doer. If the suit is brought by the beneficiary it is vested, and will survive his death.¹

Attention may be called to the distinction between statutes giving a cause of action to the representative for injuries suffered by his intestate or testator during his lifetime, and such as give an action founded on his death, or on the damages resulting from his death to the widow, next of kin, or other person in whose favor the action is given.

In the former case the statute is viewed as abolishing the common-law rule as to abatement of claims for injuries by death of the claimant, and as making the original cause of action survive for the benefit of parties designated by the statute; while on the other theory the statute creates a cause of action without reference to the cause of action the injured party might have had before his death. The measure of damages is furnished in the former case by the loss and suffering of the deceased party caused by the injury up to the time of his

¹ *Strode v. St. Louis Transit Co.*, 197 Mo. 616.

death; while in the latter case death is the cause of action, and the damages are measured by the loss to the person in whose interest the action is brought in consequence of such death. Where the injured party settles or recovers for his injuries in his lifetime, it is clear, at least in those States which hold the statute as abolishing the common-law rule as to abatement, that the personal representative has no right to sue after death of the injured person. So too where the theory is that the statute transfers the right of the injured party it has been held that no action lies for an instantaneous killing.

§ 285. **Suit for Death Loss under Law of Other State.** — The extra-territorial enforcement of these statutes gives rise to divergent rulings. Where the statute of the State of the injury on which the action must be based is viewed in the forum as penal, or as against the policy of the forum, it will not be enforced.

Only the action given by the statute of the place of injury can be enforced. If that law gives the action to the widow, she only can sue, and not an administrator. The converse is also true. But if the statute gives the action to the administrator, it is generally held that an administrator appointed in the forum can sue.

A further examination of this question of conflict of laws seems beyond the scope of this work.

§ 286. **Property conveyed by Decedent in Fraud of Creditors.** — At common law and under English statutes the transfer of property in fraud of the rights of creditors is void as to them, but good and binding between the parties thereto. The same principle is embodied in the American statutes, from which it follows that, as the representative of a decedent, the executor or administrator cannot impeach the conveyance of his testator or intestate on the ground of fraud. But the personal representative is also the representative of the creditors; hence, although he is never allowed to recover the property from the fraudulent grantee for the benefit of the heir or devisee, because they are equally bound with the grantor, yet he may consistently do so in favor of creditors of an insolvent estate. Provision is therefore made by statute, in some of the States, enabling executors and administrators of insolvent estates to recover prop-

erty fraudulently conveyed by their testators or intestates, and the property so recovered becomes assets for the payment of debts; and in some States it is so held in the absence of a statute to that effect. In most of these States, when the administrator refuses to bring such action, and the estate proves insufficient to pay the debts, creditors may bring suit themselves, making the representative a party defendant, or object to the settlement of an estate as insolvent, alleging the existence of property fraudulently conveyed; while in others it is held that a creditor cannot maintain the bill; if the administrator refuses to do so, after an offer of proper indemnity, he should be removed and another appointed.

In other States the creditor is driven for his remedy to a court of chancery, because the executor or administrator is not permitted to assail or impeach the acts of his testator or intestate.¹

As in other cases, there must be an exhaustion of the personalty before real estate fraudulently conveyed can be sold to pay the fraudulent grantor's debts, and the proceeds of such sale, whether on suit by a creditor or by the executor or administrator, become assets for the payment of debts only. In an early case the excess over the amount necessary to pay the debts was held to be distributable to the next of kin or legatees, as an incident to the administration; but the true rule is to restore such excess to the fraudulent grantee, because the fraudulent conveyance is good between the parties thereto and their representatives, binding all persons but creditors.

§ 287. **Annuities and Rent Charges.** — An annuity is defined to be a yearly payment of a certain sum of money granted to another for life, or for a term of years, and charged upon the person of the grantor only. When charged upon real estate, it is most commonly called a rent charge. As personal property, an annuity passes to the personal representative; but if granted *with words of inheritance* it is descendible and goes to the heir, to the exclusion of the executor.

Dividends upon shares in a corporation bequeathed to the testator's widow for life, declared after her death for a period

¹ The alignment of the States on either side is given in Woerner on Administration, § 296.

which expired during her life, are included in the bequest, and her executor may recover them.

§ 288. **Apprentices and Servants.**—Upon the death of a master, both his servants and apprentices are discharged, and therefore the executor or administrator of the former can bring no action to enforce the contract of service after his death; nor do they take any interest in an apprentice bound to the deceased, unless the infant, with the consent of the father, had bound himself by indenture to a tradesman, *his executors and administrators*, such executors or administrators carrying on the same trade or business.

§ 289. **Copyrights and Patents.**—Copyrights were unknown at common law. But Congress has secured to the author or inventor the absolute and indefeasible interest and property in his literary production or the subject of his invention for a specified time, which, upon certain conditions, may be extended for a further term of years. During this period the law has impressed upon these productions all the qualities and characteristics of property, has enabled the author or inventor to hold and deal with the same as property of any other description, and on his death it passes, with the rest of his personal estate, to his legal representatives, becoming part of his assets. The patent may be applied for and obtained by the executor or administrator, and is then vested in him not as part of the general assets of the estate, but in trust for the heirs or devisees, “in as full and ample a manner, and under the same conditions, limitations, and restrictions, as the same was held, or might have been claimed or enjoyed, by the inventor in his or her lifetime.”¹ It is obvious, that an extension of the term of letters patent and copyright may likewise be granted to and held by the personal representatives; and in such case the assignee of the patentee under the original patent acquires no right under the extended patent, unless such right be expressly conveyed to him by the patentee. The right of personal representatives to sell or assign a copyright or patent follows from its quality as property, and may be made by one of two or more administrators. Action for infringement of a patent may be brought by the administrator, and where a moiety has been assigned by

¹ Curt. L. Pat., § 177.

the patentee he may sue, in conjunction with the surviving assignee.

The analogous subject of trade-marks is governed by similar principles, and the authority of personal representatives with reference thereto is much the same as with reference to copy-rights and patents. Paxson, J., passing upon the question of the right of heirs or distributees to use the trade-mark of the ancestor,¹ says that, while the cases are not uniform on this subject, there is ample and recent authority that a business and accompanying trade-mark may pass from parent to children without administration; and that the business may be divided among the children, and each will have the right to the trade-mark to the exclusion of all the world except the co-heirs. He quotes from the opinion of Lord Cranworth,² who argued that, when a manufacturer dies, those who succeed him (grandchildren or married daughters, for instance), though not bearing the same name, yet ordinarily use the original name as a trade-mark, and will be protected against infringement of the exclusive right to that mark because, according to the usages of trade, they would be understood as meaning, by the use of their grandfather's or father's name, no more than that they were carrying on the manufacture formerly carried on by him.

§ 290. **Rents.** — The general rule is, that rents accruing after the deceased owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them. According to this principle, the payment of rent to an executor or administrator under a lease from him after the testator's or intestate's death is no discharge as against the heirs, and may be recovered by them even if the estate is insolvent, unless there has been some action to subject the land to the power of the executor or administrator. The right of the heirs attaches to rents accruing under a leasehold extending beyond the lessor's life, if there be a reversion to himself and his heirs; but if a lessee for years make an underlease, reserving rent, such rent accruing after his death goes to the executor or administrator, because his estate was but a chattel interest.

¹ Pratt's Appeal, 117 Pa. St. 401, 413.

² Leather Cloth Co. v. American Co., 11 H. L. 523, 534. So Field, J., in Kidd v. Johnson, 100 U. S. 617, 620.

But if the real estate is necessary to pay the debts of the deceased, the executor or administrator may be ordered to take possession of it and collect the rents therefrom, and, if these are insufficient, to sell the land, or, in some States, even take possession thereof without the order of court. It will appear hereafter, in connection with the subject of the duties of executors and administrators in respect of real estate, that in a number of States the distinction between real and personal property has been abolished, so that both go to the personal representative for administration. In such States the rents self-evidently go to the executor or administrator during the period of administration.

It is also clear that, where the real estate is devised to an executor for purposes of administration, the rents must be paid to the person administering.

Rents which had accrued prior to the death of the testator or intestate are mere choses in action, and therefore payable to the personal representative.

§ 291. Apportionment between Life Tenant and Remainderman.

— At common law there could be no apportionment of rent accruing to successive owners, so that, if a life tenant died before the rent reserved under a lease made by him became due, the rent was lost both to his executor and to the reversioner, — to the former, because no rent had become due to the testator when he died; to the latter, because he was not the lessor of the tenant. Statutes in England and the States of this country now provide that where any tenant for life died before the time at which rent reserved under a demise from him, determining with his death, became due, the executor or administrator of the lessor might recover from the under-tenant the proportion of rent which had accrued at the time of the lessor's death.¹

§ 292. The Wife's Choses in Action. — At common law, if the husband dies before the wife without having reduced her choses in action into possession, she, and not his executors or administrators, will be entitled to them. Where the husband survives the wife, he is entitled to administer on her estate, and as administrator takes all her personal estate remaining in action or unrecovered at her death. Where he dies without having

¹ Woerner, § 301.

reduced the choses in action of his deceased wife to possession, they do not go to his administrator, but to one appointed to administer her estate. In such case the wife's representatives hold the property in trust for the husband's next of kin or legatees, subject to the wife's debts. Close questions arise as to what constitutes reduction to possession, but the inquiry is not here pursued;¹ for it is to be remembered that recent legislation in most of the States has greatly changed the law with reference to the property rights of married women, and that in many cases choses in action of the wife not reduced by the husband during her lifetime now go, upon her death, to her next of kin, in the same manner as if she had been a *feme sole*.

§ 293. **Actions accruing to the Representative, officially or individually.** — It results from the ownership of all personal property of a deceased person, which by law is placed in the executor or administrator, that for any injury thereto occurring after the decedent's death, and before the final disposition to the parties entitled, the action must be brought, as we have seen, by the personal representative. And in such case, as well as in all cases where the action accrues upon a contract made by or with him as such since the death of the testator or intestate, the action may be brought in the proper name of the executor or administrator, or as such: whenever the money when recovered will be assets, the executor or administrator may sustain a suit in his representative capacity; and may join a count for conversion before the death, and one for damages after. He cannot, however, join counts on causes of action accruing to him in his private right as individual, with counts on causes of action in his representative capacity.

Since a party to a judicial proceeding is bound thereby, or is entitled to the benefit thereof, only in the capacity in which he is before the court, it is often of vital importance to determine whether one who is an executor or administrator appears in his individual or representative character. In such cases it has been held that the insertion or omission of the word "as" before the representative title was decisive of the question, and that without it the word "administrator," "executor," etc., must be regarded merely as *descriptio personæ*. But it is now generally

¹ See discussion in Woerner, § 302.

held that the title and pleadings may be considered together to ascertain the true nature of the action, and it will be treated as an individual or representative one as disclosed upon an inspection of the whole record. So where an administrator has obtained judgment against a debtor of the estate, he may maintain an action on such judgment, in another State, in his individual capacity, and if he describes himself as administrator the term will be surplusage and disregarded as being simply a description of the person.¹

¹ Woerner, Administration, § 303.

TITLE FOUR.

OF THE DUTIES OF THE PERSONAL REPRESENTATIVE IN RESPECT OF THE ESTATE.

PART I.

OF ACQUIRING POSSESSION OF THE ESTATE.

CHAPTER XXXII.

WHAT CONSTITUTES ASSETS.

§ 294. **Meaning of the Term Assets.**—Having in the two preceding chapters examined the nature and kind of property to which the title of the executor or administrator of a deceased person extends, it becomes necessary to point out the circumstances which make it his duty to possess himself of such property for the purpose of disposing of it in accordance with the requirements of the law. While the property is in the possession of the personal representative, it is generally designated by the term “assets”; and it may be profitable to consider the nature of assets generally, before treating of the duties and liabilities of executors and administrators in respect of the management of the estate coming into their hands.

In modern usage the term assets (derived from the French *assez*, sufficient) is equivalent to property available, not for enjoyment, but in trust or custody for the payment of demands; thus, the property held by executors and administrators is assets for the payment of debts and distributive shares to legatees and heirs, *sufficient* to make the executor or administrator chargeable to a creditor or party in distribution so far as such property extends.

Where property of a third person comes to the personal representative of the deceased under claim of right in the deceased, the question whether such property is assets in its practical application means whether, in the event that the right of the third person ultimately prevails, the recovery should be against the personal representative personally, as a matter outside of the administration, or against him in his representative capacity. In the latter case not only must the estate of the deceased respond to the loss, but the bondsmen of the personal representative may be liable. If the responsibility is personal, neither estate nor bond can be held.

The rule is that the personal representative is held individually responsible, and not as administrator, in litigation concerning property taken by the administrator which is ultimately adjudged to the third person by legal title. There are conflicting cases which decide that when the personal representative asserts his claim *bona fide* for the benefit of the estate, he is liable *qua* administrator, that is, the estate is liable, and not the administrator in his individual capacity.¹ But, as yet, the weight of authority is against this view.²

But from these wrongful assertions of title by the administrator those cases must be distinguished in which the administrator rightfully acquires the property as of the deceased, and third persons claim the property or some interest therein *under the deceased*. For instance, a factor sells goods of his principal and takes a note payable in his own name. In such a case if the administrator collects that note as administrator, the liability for failure to account to the principal attaches to his official position. He can also be held personally liable at the election of the claimant.³

The goods of a third person, and the proceeds of any sale of them, mixed with goods or money of the deceased, and coming with them into the hands of the administrator are not deemed assets in his hands, but continue the goods of such third person if they can be traced in specie. But if the property in the hands of the decedent belonging to others, whether in trust or other-

¹ Mulford v. Mulford, 40 N. J. Eq. 163.

² Van Slooten v. Dodge, 145 N. Y. 327; Herd v. Herd, 71 Iowa 497.

³ De Valengin's Admr. v. Duffy, 14 Peters 282, 290.

wise, has no ear-marks and is not distinguishable from the mass of his own property, it falls within the description of assets, and the owner has no remedy to recover such property except to come in as a general creditor, though, by statute in some States, fiduciary debts constitute a preferred class.

But under modern modifications of the rule, many decisions hold that a trust fund, or money held in a fiduciary capacity, does not lose its distinctive character merely because it is so intermingled with other funds that the particular coins or bills cannot be identified; it is enough if the fund can be substantially followed, and the recent tendency seems not to require the same strictness of proof as formerly.¹

§ 295. **Assets not possessed by the Decedent.** — Not only chattels in possession, but all such which the executor or administrator might by reasonable diligence possess himself of, constitute assets with which he is chargeable. So property which was never in the testator or intestate is regarded as assets when it comes to the executor or administrator; — such as money received from the United States government by an executor or administrator, in consequence of a treaty with a foreign nation, as indemnity for loss of property taken from the decedent by such foreign nation, when given as compensation for injuries suffered by the aggrieved parties.

In like manner damages assessed during the lifetime of a testator for laying out a highway through his land, but not payable until a day occurring after his death, constitute assets; salary voted to a person after his decease and paid to his executors; dividends of tolls collected by a turnpike company before the death of a stockholder; money recovered on an appeal bond given to the obligees as executors and property of an insolvent which would have been exempt in his lifetime, though at his death in the bankruptcy trustee's custody, are all assets. When the payment to be made after death is a pure gratuity, it does not constitute assets, even though payable to the personal representative of the deceased. Whether such claims be held pure gratuities or not, the right to present them must be treated as property for the purpose of giving the probate court jurisdiction to grant letters, especially when the tribunal charged with

¹ *Elizalde v. Elizalde*, 137 Cal. 634.

the distribution of the fund would not recognize any but an administrator appointed in the State as competent to receive the fund.

The money due upon a policy of life insurance payable to a testator or intestate for the sole use and benefit of himself, or to his legal representatives, or according to his will, is assets which it is the administrator's duty to collect and inventory; and he and his sureties are liable for a failure to administer the avails of such insurance. So of insurance against loss by fire payable to the legal representatives of the insured. And a life insurance payable to a particular person other than the insured or his representatives constitutes no part of the insured's estate, but vests in the beneficiary as a gift, taking effect in possession on his death; if the beneficiary die before the insured, the insurance constitutes assets in the hands of the personal representatives of the beneficiary.¹

Realty bought by an administrator for the estate at his own sale, to satisfy a judgment in favor of his estate, may be treated as personalty until his official duties touching it are performed; and realty acquired in satisfaction of a judgment in favor of the estate is held by him in trust until it is ascertained that it is not needed to pay debts and administration expenses. So also real estate purchased by him for the estate in foreclosing a mortgage debt due the estate is assets for which he must account.

§ 296. **Accretions, Interest, Rents, Profits.** — It is obvious that goods and profits which have accrued since the death of the testator or intestate from property in the hands of the executor or administrator are likewise assets, including interest received by him, and revenues from the estate in his charge, all rents accruing from real estate, proceeds of sale thereof, and damages for injuries thereto, when such real estate itself constitutes assets. Where the executor or administrator undertakes to carry on the decedent's trade, or does so in pursuance of a provision of articles of copartnership entered into by the deceased, or by direction of the testator in the will, or under the directions of a court of chancery, the proceeds of such trade are assets for which the executor or administrator is liable. So the

¹ For authorities on points in this section, see Woerner on Administration, § 306.

good will of the decedent's business; but a license to sell intoxicating liquors is personal to the licensee and not such property as will pass to his administrator as assets of his estate; but if the grant of a license had increased the value of the fixtures, good will and unexpired term of a lease, the executor is liable to be surcharged with the enhanced value which might have been obtained by a sale. Chattels real or personal, to which the executor or administrator becomes entitled after the death of the testator or intestate, by force of a condition, are assets, as well as such chattels which the decedent had mortgaged or pledged, and which the executor or administrator redeemed. In like manner, the money furnished by heirs in order to save the realty from being sold for debts is assets.

§ 297. **Property in Foreign Jurisdiction.** — The ancient doctrine of the common law was, that "assets in any part of the world shall be said to be assets in every part of the world."¹ This doctrine, applied in its general scope, without reference to the authority or liability of particular administrators in different jurisdictions, is as valid now as it has been at any time, and is objectionable only as containing an unmeaning truism, resolvable into the proposition that assets are assets. It is very clear that an administrator cannot be held accountable for property which it was not in his power to recover or obtain possession of; hence the doctrine that assets anywhere are assets everywhere is true only as applied to property which the administrator may lawfully collect or recover under the law of the forum granting the letters; for only such property is "assets" within the definition given in *Touchstone*. It is accordingly held, that an executor appointed in one State cannot be held to account for assets received in another State. The liability of the executor or administrator in such case is in his individual capacity, not enforceable in the probate court, but in a court of law proceeding according to the ordinary forms, or in a court of chancery.

The situs of a debt as conferring jurisdiction has been discussed *ante*, § 187.

§ 298. **Property lost through Administrator's Negligence as Assets.** — The term assets is applicable not only to property

¹ *Touchstone*, 496.

actually taken into possession by the executor or administrator, but to all which he might have possessed himself of by the exercise of reasonable diligence. Hence he is chargeable with personal property belonging to the estate of his testator or intestate, and lost through his negligence, although it never came to his hands. It has been held that he is not liable for the loss of assets, even if he had them in possession, unless he has been guilty of such gross neglect as will amount to *mala fides*; but the prevalent rule as to the liability of executors and administrators requires of them that degree of care and skill which prudent men exercise in the direction and management of their own affairs.

§ 299. **Debts of Executors or Administrators as Assets.** — In the absence of statutory provisions to the contrary, the nomination by a testator of his debtor as executor operates the extinguishment of the debt, because an executor cannot maintain an action against himself; and the personal action once suspended by the voluntary act of the creditor, it is forever gone and discharged, except against the creditors of the testator. But in equity the debt is presumed to have been paid by the executor, and constitutes assets for the payment of the testator's debts and legacies, because in equity that which the law requires to be done must be presumed against the obligor to have been done. The appointment of a debtor as administrator of his creditor's estate has a similar effect for the same reasons; but since the appointment of the administrator is not the voluntary act of the intestate, the debt is not extinguished, but the action therefor only suspended by such appointment; hence the administrator *de bonis non* of the intestate has an action against the representative of a deceased administrator debtor.

In America the equitable rule above mentioned is generally the rule at law also, and, in the absence of statutory regulation of the subject, the debts of executors and administrators are *prima facie* assets in their hands, to be accounted for like any ordinary assets. Most of the States have regulated this question by statute, declaring that the appointment of a debtor as executor or administrator shall not operate to extinguish the debt.

The debt of the executor or administrator is in these States to be accounted for as other debts or assets. But in some of the

States the statute makes the executor or administrator liable for the amount of his debt as for so much cash in hand. It is clear that in these States a solvent administrator's note in favor of the estate is cash assets and the sureties on his bond are liable; but in some of the States it is held that the administrator and his sureties are equally liable, whether or not the administrator was solvent during any period of the administration, by operation of the legal fiction, that where the right to demand and the liability to pay co-exist in the same person, the law presumes instantaneous payment, and extinguishes the debt.

But not all States favor the proposition that the statutory conversion of the administrator's debt is equivalent to its collection in cash. It is accordingly held in a number of States that the executor or administrator may defend against his official liability by showing that at the time of the grant of letters he was, and until the time of the final settlement he remained, insolvent.¹

§ 300. **Property in Auter Droit not Assets.** — As we have seen (*ante*, § 294), money or property which was held by one in trust for another, is not assets in the hands of the personal representative of the deceased trustee against the beneficiary of the trust.

§ 301. **Legal and Equitable Assets.** — In England, and in some of the American States, a distinction is recognized between assets which may be reached at law, or legal assets, and such as can be administered only in equity, or equitable assets. Legal assets must be administered by the executor or administrator in due course of administration, having regard to the rules of priority among creditors recognized at law, which will be considered more fully hereafter; but equitable assets, although debts are to be paid out of them before legacies, are to be distributed among creditors *pari passu*, without regard to priority of one debt over another.

In most of the American States, the whole matter of assets is regulated by statute, and the distinction between legal and equitable assets is of little or no practical importance, not only

¹ With reference to the attitude toward the questions discussed in this section, the States are listed and the authorities quoted in Woerner on Administration, § 311.

because in many instances the necessary equity powers to deal with this subject are vested in the probate courts, but chiefly because the statutes themselves determine the powers, duties and liabilities of executors and administrators, and the manner of subjecting the property of decedents to the payment of their debts.

§ 302. **Personal and Real Assets.** — Assets are also distinguished, at common law, as personal and real, the latter being liable, in the hands of the heirs, for debts of the ancestor on bonds, covenants, and other specialties when the decedent bound himself and his heirs. The liability of real estate was extended by statute to all debts, whether on simple contracts or on specialty, and heirs and devisees made liable to the same suits in equity for simple contract debts of their ancestor or testator as they had at common law been liable to for debts by specialty. But in the American States the subjection of real estate of deceased persons to the payment of their debts is so fully covered by statutory law that it becomes necessary to devote a separate chapter to the consideration of the general principles and of the mode of proceeding common to them. It may be stated here, however, that the general rule in America is to hold the real estate of deceased testators and intestates liable for the payment of all their debts, without regard to quality or degree, and mostly their legacies, in all cases where the personalty is insufficient for such purpose; and this without recourse to equity, by summary proceedings in the probate courts.

CHAPTER XXXIII.

OF THE INVENTORY AND APPRAISAL.

§ 303. **Office and Necessity of the Inventory.** — One of the most important duties incumbent upon executors and administrators, involving equally their own protection and that of the estates committed to their care, is the making of an accurate inventory of all the property, both real and personal, including chattels in possession and choses in action, as well as contingent or prospective interests. Inventories are required from executors and administrators by statute in every State in the Union, and the making of "a true and perfect inventory of all the goods, chattels, credits, and estate that have or shall come to his hands, possession, or knowledge," is usually one of the conditions of the bond given by them; so that the mere omission to make and return the inventory is a breach of the bond, and renders the executor or administrator liable, but does not render void proceedings had under such administration. *A fortiori*, the wilful omission to include in the inventory any property known to the administrator to belong to the estate of his intestate is a breach of his official bond. A provision in a will that no inventory of the estate shall be filed is against public policy and void.

The presumption arising against an executor or administrator by reason of his failure to return an inventory, although not sufficient of itself to charge him with the payment of debts or legacies, is yet a strong circumstance in support of the charge of improper conduct, and the omission of assets therefrom is a fraud, or its equivalent, unless it arose out of an honest mistake of fact or misconception of the law.

§ 304. **Within what Time the Inventory must be filed.** — The time for the return of the inventory into court is fixed in the different States at different periods. In the American States no inventory can be required until an executor or administrator

has been appointed by the court having jurisdiction, or until the executor has taken upon himself the administration; but a commission is, in most States, required to be appointed by the judge or court of probate, consisting of two, three, or sometimes five discreet and disinterested persons, whose duty it is to value, or *appraise*, the effects inventoried by the executor or administrator, or conjointly with him to make out the inventory. They are known, generally, as *appraisers*, and in all cases act under oath.

If the executor or administrator neglect to file the inventory, provision is made for the citation and attachment of the delinquent by the spontaneous action of the court, without motion or petition by creditors or distributees; and if he disobey the citation, he may be coerced by fine or imprisonment for contempt of court, or be removed from office for neglect of duty. But creditors and distributees of a decedent have also the right to require the executor or administrator to file an inventory, and an application for an order of the probate court for that purpose will not be refused, if made within a reasonable time.

In most States, it is required that, if, after returning the inventory, other goods or property of any kind come to the hands or knowledge of the administrator, an additional inventory shall be exhibited, including the newly discovered assets.

§ 305. **What Property must be inventoried.** — The inventory must include all personal property of the decedent, of whatever kind or nature, which is or may become assets. To this extent the statutes of all the States are alike. But with respect to the property appropriated by the law for the immediate support of the widow and minor children, in which neither the creditors nor other legatees or heirs can have any interest, there is some diversity in the legislation. In many, if not most, of the States, provision is made excluding such property from the general inventory; in several of them, the executor or administrator, or the commissioners appointed to appraise the property, are required to make a separate inventory and appraisal of the property allowed or set out to the widow or family; but in others no provision is made on this subject. In these States it seems that, in the absence of a statutory provision to the contrary, it is the administrator's duty to inventory and cause to be appraised

the widow's absolute property, together with the property generally; and having charged himself with the amount thereof, he will be entitled to take credit for whatever amount he turns over or pays to the widow, either upon order of the court, or in compliance with the statutory allowance.

Real estate constitutes assets to pay debts, and when necessary for that purpose it goes to the personal representative and must obviously be inventoried. But since it cannot always be known at the time of making the inventory whether the personal property is or is not sufficient to pay the debts, or whether recourse must be had to the real estate for that purpose, it is provided by statute in England, and most of the American States, that all real estate belonging to the decedent shall be included in the original inventory, or, if discovered subsequently, in an additional inventory. Specific personal property in the hands of a testator or intestate at the time of his death, belonging to others, which he holds in trust or otherwise, and which can be clearly traced and distinguished from his own, is not assets, but is to be held by the executor or administrator as the deceased himself held it; and it is not, of course, to be inventoried.

In almost every State the statute enumerates the different kinds of personal property which is required to be inventoried, such as "goods, chattels, money, books, papers, and evidences of debt," etc. This includes debts due by the executor or administrator, because in America the appointment of an executor or administrator who happens to be a debtor to the testator or intestate does not cancel the debt. He is to inventory *all* the personal property of which he has any knowledge; hence it has been held that assets belonging to a deceased resident, situated in another State, must be included; but this can apply to such assets only as are not in the rightful possession of an administrator in such other State, or that may come within the jurisdiction of the State granting the letters. In those of the States in which the executor or administrator is authorized to impeach the conveyance of his intestate or testator on the ground of fraud against creditors, he must also inventory all property so fraudulently conveyed. Property in the possession of other parties, if it belong to the decedent's estate, must also be inventoried. And it is proper, and the duty of the administrator,

to inventory all property found among the effects of the deceased, if he does not know them to belong to another.

The executor or administrator can be required to inventory only the property which belonged to the decedent at the time of his death, in his own right, or to which the personal representative is entitled in his official capacity, as distinguished from the heir, legatee, widow, or donee *mortis causa* of the testator or intestate. The court has no power, therefore, to compel the administrator to inventory property not clearly belonging to the estate. On the other hand, the court should not reject an inventory exhibited because it contains property the title to which is in dispute; because, as appears in a former chapter, the probate court has no power to try the title to property between the personal representative and strangers. A third person claiming property by title paramount is not prejudiced by the fact that such property is inventoried as assets of the estate.

If no property come to the knowledge of the administrator he cannot, of course, make an inventory; but he should nevertheless file an affidavit showing that no assets came to his hands, for the information of the court and parties in interest.

§ 306. **Details of the Inventory.** — The inventory should not only be full and complete, so as to include every item of property belonging to the estate, but it should set out each item separately, with the amounts indicating the value or appraisement in detail. As a question of policy, it is evident that the additional labor and expense involved in minutely itemizing each article, account, note, bond, etc., rather than grouping or aggregating them and stating the value or amount in the sum is insignificant when compared with the importance of the safeguard thus obtained for the interest of the estate, and the protection thereby afforded to the executor or administrator who is disposed to act with diligence and in good faith. But this is not only a question of policy addressing itself to the judgment of parties managing estates; it is a legal obligation. The statute in nearly every State requires not only "a full, true, and perfect inventory," etc., but also directs that each article of property shall be separately appraised and its value noted. It is the duty of the court to which an inventory is returned to reject it if

not made in compliance with law, and require a new one which shall be in due form.

§ 307. **Indication of the Value of Assets.**—The utility and value of the inventory depend in a great measure upon the reliance that may safely be placed on the value of the property therein listed. Provision is therefore made in many of the Statutes, that either the executor or administrator making the inventory, or the commissioners appointed to make the appraisal, shall state as fully and accurately as may be possible to them whether the debts inventoried are sperate, doubtful, or desperate, or what, in the opinion of the executor or administrator, may be collected of the securities and debts. Debts inventoried without comment, or showing that they are desperate or doubtful, must be accounted for, unless the executor or administrator show that set-offs existed, or that the debtors were insolvent; and the presumption of solvency of the debtor is stronger where the administrator himself is the debtor. Debts inventoried as desperate the administrator will not be charged with, and the sale of notes and accounts inventoried as valueless and of bad debts is proper, and the administrator is chargeable only with the proceeds of such sale. Debts of non-resident insolvent debtors may, it has been held, be omitted from the inventory entirely. The appraisers must also estimate the value of chattels in possession belonging to estates, noting each article exhibited to them, and affixing the price which, in their opinion, it is worth. It has already been mentioned that the statutes require great minuteness and particularity in the appraisement, — a provision which appraisers should never lose sight of.

§ 308. **Appraisement of the Goods.**—The importance and responsibility of the office of appraisers or commissioners to value the property belonging to the estates of deceased persons are not always sufficiently appreciated. Although not technically, in most cases, conclusive either for or against the executor or administrator, the inventory and appraisement are in every instance *prima facie* evidence, and therefore decisive always when not obviously erroneous, or when clear and convincing evidence is not attainable to rebut their *prima facie* validity. And they are of necessity conclusive when other parties have been governed by, or act upon the faith of, such appraisement.

Nor are their duties free from difficulty: the statute requires the property to be appraised "at its true value," and leaves the appraisers to their own resources to find what "true value" is. For purposes of appraisement the value of property is what it will bring. Appraisers are therefore not concerned about the cost of the property submitted to them for valuation, nor its intrinsic value, but only in the amount of dollars and cents which it can be exchanged for. With regard to the further question as to what method of exchange is to be contemplated by them for the purpose of valuation, it must be remembered that executors and administrators are not required to be merchants or salesmen, and that the law requires the sale of property of deceased persons, generally, to be at public outcry to the highest bidder. The price which, in their opinion, property will bring at such a sale, should then, it would seem, be their valuation or appraisal.

CHAPTER XXXIV.

DUTIES OF EXECUTORS AND ADMINISTRATORS IN TAKING CHARGE
OF THE ESTATE.§ 309. **Duty of Administrators to take Estate into Possession.** —

It is the duty of executors and administrators to collect and take into possession all the goods and chattels that belonged to or were in the possession of the late testator or intestate at the time of his death, so far as they have knowledge thereof, and which they may recover by the exercise of reasonable diligence and prudence. For any wilful or negligent omission to do so, or to protect and preserve the same until they are delivered to those to whom they belong by the terms of the will or Statute of Distribution, they make themselves liable on their bond. It is for the administrator to determine what property belongs to the estate in his charge; and to bring the necessary suit at law or in equity to recover the same, without waiting for an order from the probate court to that effect.

The duty of taking possession of trust funds which remain in the hands of a decedent at the time of his death, and settling his accounts in relation to the trust, devolves primarily upon his executor or administrator; the latter is not bound to proceed in the execution of the trust, but must preserve the fund for those entitled. But the trust fund, not having been the property of the deceased, passes into the custody of the representative, who is a kind of bailee for the true owner.

Their authority is co-extensive with that of the law of the State or country granting their letters; hence their duty is to take into possession all the goods, rights, chattels, and credits of the late decedent found within this jurisdiction. And it has been held that, where a testator left property within another jurisdiction, it is the duty of the executor to take probate of the will there, or such other steps as may be necessary to enable him to collect such property. But this doctrine is greatly at

variance with the views entertained in other States, in some of which courts go to the length of holding that an administrator cannot be made liable for property of the intestate actually received in another jurisdiction; and the case of *Schultz v. Pulver*,¹ holding the administrator liable for not collecting assets in a foreign State, was decided by a court nearly evenly divided, some of the Senators expressing themselves very earnestly against the prevailing opinion. Where foreign executors and administrators are permitted to maintain actions without new probate or appointment in the State *rei sitæ*, in consequence of which the Statute of Limitation is held to run from the date of the foreign probate or appointment, it would seem necessary, to avoid the loss to the estate of assets so situated, that the executor or administrator should collect the same. The appointment of a domestic administrator in such State will clearly defeat the right of any foreign executor or administrator to recover the assets; and it is self-evident that, in those States in which the authority of foreign executors and administrators is not recognized, the Statute of Limitations cannot be held to run before the appointment of a domestic administrator; the chief reason for holding administrators liable to collect such property does not, therefore, exist.

§ 310. **Right of Administrator paramount to Heir or Legatee.** — The executor or administrator stands as the representative of those to whom the personal property of the deceased devolves, whether creditors, legatees, or distributees; and his action in respect thereof, in the absence of fraud or collusion, is conclusive upon them. And, since the executor or administrator is entitled to the possession of all the personal property and chattels of the decedent, neither heirs nor legatees can prevent him from taking and collecting the same, and subjecting to sale a sufficient amount thereof to pay the debts and legacies, unless they should furnish him with money to do so. As a rule, only the executor or administrator can maintain actions in behalf of the estate, or make distribution. If the administrator refuses or neglects to bring the action, the remedy of the injured parties is on the administrator's bond.

So, although in most States the real estate descends at once

¹ 11 Wendell 361. See Woerner on Administration, § 321.

to the heirs or devisees free from the control of the personal representative, so that, as we have already seen, actions concerning the same must be maintained by or brought against the real, and not the personal representative, yet the right of the administrator to subject the real estate to sale for the payment of debts is paramount to the claims of the heir or devisee, or of his vendee or assignee.

§ 311. **Their Duty to prosecute and defend Actions pending by or against the Estate.** — It is their duty to prosecute and defend all actions commenced by and against the testator or intestate which survive to or against the personal representative. There may also be judgment after the death of a party if verdict has been rendered before in actions which do not survive. Thus, as a matter of practice at common law, as well as under statutes in the several States, judgment will be entered on the verdict, on motion, as of a preceding day, or term of the court, whenever an action, continued or postponed for the purpose of obtaining a disposition which may relieve a dissatisfied party from a verdict, would otherwise fail by the death of a party to it. With the exception just stated, the action abated at common law when the testator or intestate died before final judgment; but by statute in England, the American States, and the Federal Courts, the action may be continued in the name of the personal representative by his voluntary appearance, or the service upon him by the other party of a *scire facias*, or notice. It has also been held, generally, by what seems to be the preponderance of authority, that in courts of plenary jurisdiction a judgment rendered for or against a party after his death, if the action is regularly begun in his lifetime, is erroneous, but not for that reason void, while a judgment in a suit begun and prosecuted for or against a dead man is clearly void.

In America, an executor or administrator may generally obtain the same remedy upon a judgment in favor of the testator or intestate during his lifetime as the deceased could have done. It is the duty of an administrator *de bonis non* to assume the defence of an action against his predecessor on a contract of the deceased, and to prosecute suits commenced by his predecessor.

§ 312. **Actions to recover or defend the Estate.** — Executors

and administrators are bound to prosecute all actions that may become necessary to recover debts owing to the estate, or property of any kind, and to protect the interest of the estate whenever the same is jeopardized. To this end they must act not only with honest intent and perfect integrity, but also with promptness and diligence, and reasonable prudence and foresight. They are required to investigate the circumstances attending the affairs of the estate, lest by indifference and indolence its debtors escape or become insolvent, and the estate suffer. If they are remiss in their duty in this respect, they become liable personally, and on their bond, for whatever loss may ensue.

But they are not bound to attempt the collection of bad or doubtful debts, or to prosecute claims of a doubtful character, at least not unless the parties demanding such prosecution will indemnify the estate or the executor or administrator against the costs. Nor are they liable for a mistake of the law, whereby proceedings in collecting a debt are delayed until the debtor becomes insolvent, if they act in good faith and upon advice of eminent counsel; nor for failing to bring suit for property until the Statute of Limitation has barred recovery, in a case where both the law and the facts are doubtful, if they act in good faith and without fraud, wilful default, or gross negligence. So a due regard to the ultimate security of the debt may require him to indulge the debtor. And although they make themselves liable by indulging a debtor, yet the legatees, upon whose advice and request the indulgence is granted, will not be heard to complain. Nor are they obliged to maintain an unjust claim in favor of the estate, or to prevent a suit from being fairly tried by insisting on technical advantages; nor to defend against a just claim. It is held, with some dissent, that the personal representative may bind the estate by consenting to a judgment, if there is no substantial ground for defence.

§ 313. **Summary Proceedings to recover Assets.** — In addition to the ordinary remedies at law and in equity by means of which executors and administrators may recover the property of an estate, a summary proceeding in the probate court is provided by statute in many States, enabling them, or heirs, legatees, or other parties interested in the estate, to make dis-

covery, and in some States to compel the production and delivery of property suspected to be concealed or embezzled, in a more speedy and less expensive mode than by the ordinary remedies of bill of discovery, detinue, trover, replevin, or other action at law.

In a great number of States power is given to probate courts to cite parties suspected of having concealed, embezzled, or converted any goods, chattels, or money, or having in their possession or knowledge any evidences of debt or right of the deceased, and compel such persons to answer under oath. The proceeding in such case is held to be plenary, the object being to perpetuate the evidence against the party charged, to be used upon any action to be brought thereon, and the testimony must be reduced to writing. In many of these States, a like proceeding is authorized against persons to whom the executor or administrator intrusted property of the estate, and who wrongfully withhold them. The appearance of such parties, and their answers to the interrogatories propounded to them, may be enforced by attachment and imprisonment.

Under this class of statutes all that is attained is a discovery, furnishing a basis for proceeding in another tribunal. But in other States the party found guilty of concealing or embezzling any property belonging to an estate may, under the statute, be compelled by the probate court to produce the same, and deliver it to the party entitled. In Missouri it has been finally held that the purpose of the statute was to expedite the administration by providing a new and speedy remedy for collecting assets, including the right to try disputed claims of title to property.¹ There is thus in Missouri a regular trial in probate court, with a jury, and with witnesses on both sides. And in that State this proceeding is held applicable against executors and administrators, at the instance of parties interested in the estate, and, on conviction, the court will compel such officials to properly inventory the effects or money in their possession.

Where the proceeding under the statute is more than a bill of discovery and culminates in a judgment, the decision is final, so that the discharge of the defendant upon such a proceeding, when not appealed from, constitutes a bar to a recovery.

¹ *Clinton v. Clinton*, 223 Mo. 371, 388.

ery in another action between the parties in respect to the same property.

This summary remedy, whether as discovery or as a proceeding for recovery of property generally, is not applicable unless the identical property belonging to the estate, and being identified, is still in the possession or under the control of the respondent. If the affidavit alleging concealment or embezzlement do not affirmatively show that the party making it has an interest in the estate, it is defective, and gives the court no jurisdiction of the person complained of. In most States the interrogatories to the party accused and his answers thereto are required to be in writing.

The constitutionality of these statutes authorizing summary proceedings has been assailed on several grounds. It may be urged that they are penal; that by providing imprisonment as a means for enforcing collection, they conflict with constitutional provisions against imprisonment for debt; that they compel the accused in a criminal case to testify against himself; and that they are in conflict with constitutional provisions against unreasonable seizure and search. An additional question arises when the right to trial by jury is not preserved. In general, these statutes have been held remedial, not penal. While some provisions have been set aside as unconstitutional, it is believed there is no ruling preventing the substantial enforcement of the system anywhere by proper legislation. Further discussion is outside the range of this treatise.¹

¹ Fuller information as to these summary proceedings can be found in Woerner on Administration, § 325.

PART II.

OF THE MANAGEMENT OF THE ESTATE.

CHAPTER XXXV.

OF THE DUTIES OF EXECUTORS AND ADMINISTRATORS WITH
RESPECT TO PERSONAL PROPERTY.

§ 314. **Compounding with Debtors.** — At common law compromising a debt due an estate between the debtor and the personal representative of the deceased is binding on the estate. But if the personal representatives released a debt due the testator, or cancelled or delivered to the obligor a bond, or released a cause of action founded on a tort accruing to the testator or executor, or in any manner forgave or indulged any part of the testator's or intestate's demand, or the demand of the executor or administrator, they were chargeable *prima facie* in settlement of the estate as against all parties interested therein with the whole of such debt or demand with interest. But even at common law personal representatives are responsible only to the extent to which their acts injured the estate, and so might excuse themselves from liability by affirmatively showing that such compromises were actually for the benefit of the estate.

But now, in England and most of the States of this country, provision is made by statute authorizing the executor or administrator to compromise with debtors under sanction of the probate court. Such order, obtained in good faith, protects the personal representative, though subsequent events make the settlement thereunder unfortunate for the estate. If the personal representative acts without authority of the court, or if the court is not vested with the power to grant such authority, he does so at his peril, and assumes the burden of proving, not only that he acted in good faith and with ordinary prudence,

but that the estate has in no wise been prejudiced thereby. In Kansas, Indiana, and some other States these statutes, authorizing compromises under order of court, are held to change the common law, so that a settlement by the personal representative without order of court is not binding on the estate.

In the exercise of its discretion in passing upon a petition or motion for leave to compromise, the probate court will be governed by considerations for the interest of the estate exclusively. Neither the executor nor the court can modify a contract or existing obligation; and the court will never interfere, except where the debtor is insolvent, or some doubt exists as to the validity of the claim, or there is reason to apprehend that payment cannot be coerced. Even an order of court properly obtained does not protect the representative, if the necessity of such compromise was occasioned by his own negligence in failing to enforce a good claim before it became doubtful. Where money is gained or saved by executors or administrators in compromises, it enures to the benefit of the estate, and not to themselves.

§ 315. **Arbitration.** — It seems never to have been doubted that executors and administrators have full authority at common law to submit any matter in dispute, relating to the estate of a deceased person in their hands, to arbitration, and thereby bind themselves to the extent of assets. But while the award is undoubtedly binding upon the parties, as well as upon those having any interest in the estate, it affords no protection to the executor or administrator, although acting in perfect good faith, against liability as for *devastavit*. For if a less sum should be awarded than he would be entitled to recover at law, he may be held to account for the deficiency to the heirs or other persons interested in the effects of the testator or intestate. There is, therefore, no inducement for an executor or administrator to submit a controversy concerning a demand, either in favor of or against the estate, to arbitration; he should, in self-defence, settle all such controversies in a court of justice, unless the award, under provision of a statute, receives the force of a judgment, as it does in some States.

§ 316. **Protest and Notice respecting Negotiable Paper.** — In

general the executor or administrator of a deceased party to negotiable paper stands in the shoes of the deceased for purposes of fixing the rights and liabilities of the other parties.

Thus if the holder of a bill or note die, his executor or administrator must make demand and give notice of dishonor, in order to bind indorsers. But if, at the time of maturity, no representative of the estate has yet been appointed, the indorsers will not be discharged from liability if demand is made of the maker within a reasonable time after the representative's qualification, and notice of dishonor is seasonably given to them thereafter.

So while the soundness of the rule requiring presentment for acceptance to the administrator of a deceased drawee of a bill of exchange has been doubted by high authority, it is held that in order to charge an indorser on a promissory note, demand must be made of the representative of the deceased maker, if he can by reasonable diligence be found, and no exception to the rule is made where the indorser is appointed administrator of the maker's estate.

So, on the other hand, the personal representative of a deceased indorser, sought to be held liable by the holder of negotiable paper, is the only proper party to be served with notice of dishonor or protest, if by reasonable diligence the fact of the indorser's death and the appointment of such representative can be ascertained; and this though the maker becomes the deceased indorser's representative.

Service of notice on one of several executors of a deceased indorser is sufficient to bind the estate. Upon the death of one partner the notice should be served upon the survivor.

Where the holder, without being chargeable with negligence, does not know of the indorser's death or who his representative is, notice directed in the deceased's name is sufficient; and likewise if no administrator has as yet been appointed upon whom notice can be served, a notice is good when addressed to the deceased indorser, or to his "legal representatives," at the late residence. And under such circumstances a notice served on one whom the will names as executor is good, although it may be that he will never qualify as such, but not after he has refused to accept the executorship and a special administrator been

appointed; nor is this principle applicable to a notice served on one who is not at the time, but later becomes, the administrator, as he stands in a different position from an executor in this respect.

§ 317. **Duties in Relation to the Contracts and Trade of the Deceased.** — Executors and administrators are bound, to the extent of the assets coming to their hands, by the contracts of their testators or intestates, including not only debts, but also collateral acts, whether named in the contract or not, or whether it be a simple or record contract; and they must answer in damages for a breach, whether incurred before or after the decedent's death. Thus, if one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a subcontractor is entitled to his lien for materials furnished the intestate.

As between the personal representative and the ultimate beneficiary of the estate, the former may, as a general rule, exercise his discretion whether to perform or rescind any contract of the deceased imposing an obligation or duty upon him, in the best interest of the estate, subject, in general, to the approval of the court. If a contract has been performed in part, and is then rescinded, after the contractor's death, by his executor, the other party may recover for the work already done, if he consent to the abrogation; but if he insist on completing the contract, the estate is bound for the whole. It may be proper to remark, in this connection, that where an administrator has his election either to ratify or disavow the act of his intestate, he cannot, after ratifying, disavow it; as where money was procured from the intestate by fraud, or by reason of his insanity, the administrator may disavow or ratify the act; but if he ratify the payment of the money he cannot afterward pursue a remedy inconsistent with such ratification. So the administrator's election to ratify the contract of an insane intestate validates the same for all purposes and binds the heirs. Outstanding contracts for the improvement of the real estate by the erection of tenements, only partially fulfilled, are a

charge on the personal estate; although the contractor has a lien on the land also, his remedy against the administrator is not thereby impaired.

If the executor or administrator decide to enforce or carry out the contract, he is liable at common law for the net losses that may accrue to the estate in consequence thereof, while any profits arising become assets of the estate. In equity, however, and under the statutes of most American States, the administrator acting in good faith will be protected in the execution of a contract the breach of which would result in damages, although the estate is insolvent, and the loss in carrying out the contract be greater than the damages for the breach would have been.

Contracts of a personal nature, depending upon the personal skill or taste of the obligee, such, for instance, as the obligation of an author to prepare a book for publication, of a master to instruct an apprentice, a contract to marry, or any obligation to be performed by the contracting party in person, are not binding upon the executor or administrator.

The obligation of the personal representative to execute contracts of the deceased extends, as is evident from the statement of the proposition, to such only as were legally binding upon the deceased. He cannot by any act of his own bind the estate by a new debt or obligation; hence any contract which he may enter into with reference to the estate, though clearly intended and expressed to bind it, binds himself individually only, as between him and the other contracting party, with the right, on his part, to resort to the estate to reimburse himself for any outlays necessary to the administration of the assets.

It follows from this principle, that it is not within the ordinary scope of the authority of an executor or administrator to carry on the trade or business of the deceased; and that one who undertakes to do so with the assets of the estate necessarily assumes the risk of making good all losses that may occur to the estate, while the profits, if any, become assets. The executor or administrator is therefore chargeable with the assets coming into his hands, including all profits or returns from the trade or business which he carries on therewith, and is not allowed credit for his losses, even if he acted in perfect good faith.

Protected from loss and from liability at all times, the estate is interested in the business only to the extent of the profits. And so, where an executor or administrator with the will annexed, continues the business of the testator in good faith, in compliance with a direction to that effect in the will, all losses by bad debts, costs of personal property, purchased to replace similar articles worn out or consumed in conducting the business, expenses for repairs, etc., on the real estate used, are properly chargeable against the estate. The executor carrying on the business under the will is personally liable to the persons with whom he deals as such, but an equitable right arises to the trade creditors to resort to the estate if their remedy against the executor is inadequate. Where the executor or administrator carries on the business of the deceased in good faith, at the request of the heirs, distributees, or legatees, they will not be heard to object to credits in his account for losses incurred in consequence thereof; but the onus lies upon the accountant in such case to show such consent upon a full understanding of all the circumstances.

Upon executors and administrators devolves also the authority and duty to vote the stock held by their testators or intestates. It matters not, in this respect, whether such stock was held in their own right or in trust, nor whether transfer thereof had been made on the company's books. Since the right to vote follows and cannot be separated from ownership, it also follows that where stock is held by several executors, who differ as to how it should be voted, it cannot be voted at all.

§ 318. **Preserving the Property.** — Executors and administrators are responsible for the preservation of the personal property while it is in their custody. Hence it becomes necessary, in many cases, in order to avoid material loss and injury to the estate, to employ additional labor to take care of horses or other stock requiring attention, to tend and gather crops, to protect property in danger of being lost, and to complete work in an unfinished state, or contracts binding upon the personal representatives. It is always advisable to obtain the order of the probate court in such cases; but if such labor is required when court is not in session, it is their duty to employ the necessary assistance at once; and all reasonable expenses so accruing con-

stitute a proper charge against the estate, and will be allowed as credits in the administrator's account or settlement. Administrators should not contribute voluntarily to make up losses of incorporated companies in which the estate owns stocks, if they are of little or no value; but if they are valuable, they should pay assessments to which they are liable, and which constitute a lien on the shares held by them, in order to prevent their forfeiture. An executor or administrator has an insurable interest in the property of the estate, and is entitled to allowance for the premiums necessary to effect a safe insurance thereof.

The interest of the estate may demand that the executor or administrator redeem property of the estate which may be mortgaged or pledged, and in such case, if it is his duty to do so, he will be allowed all proper disbursements for that purpose; but obviously he cannot be held accountable for not redeeming property when the estate has no funds available for such purpose. Nor is he liable for not redeeming, if in the estate's interest he honestly and prudently exercises his best judgment in declining to do so.

§ 319. **Taxes on Personalty.** — The duty of the personal representative in connection with taxation of realty is discussed in a later section.

Taxes on the personalty assessed prior to the decedent's death usually constitute a liability of the estate which the representative should discharge out of the personal assets, even though the amount was not definitely ascertained at the time of the death of the testator or intestate. Claims for such taxes due from and not paid by decedent before his death may be established in the probate court, and by statutory provision in nearly all the States constitute a preferred class of claims.

Since the title to the personalty and right of possession vests in the personal representative, taxes legally accruing thereon after the decedent's death and before distribution is made, are assessed to, and should be paid by, the executor or administrator without presentation or allowance by the probate court; and when paid, he will be entitled to credit therefor in his account as for expenses of administration. For purposes of taxation and payment of taxes, the title and possession of the exec-

utor or administrator relates back to the time of the decedent's death, and that of the administrator *de bonis non* to that of his predecessor, so far as affecting unpaid taxes. The liability of the representative for failure to pay such taxes is in some States made personal, but in others his liability is official, and he cannot be held liable after the estate has been distributed and he discharged. After distribution the assessment should, of course, be to the new owner, but not before.

When the personalty of the deceased lies in several States it is conceded that the rule that personalty follows the domicile of the deceased does not apply for purposes of taxation. Goods and chattels of the deceased found in the ancillary administration are there taxable, and as to such property it is believed there is no actual conflict, as the State of the domicile of the deceased does not attempt to draw such property under its taxation laws. But where the personalty is intangible, for instance a debt owing the deceased by one domiciled in the ancillary jurisdiction, or shares of stock in a corporation existing under its laws, there is often a sharp clash between the domiciliary and ancillary jurisdiction. Each claims that the situs of such chose in action is with it: thus double taxation may, and often has, resulted. Says Holmes, J., in *Blackstone v. Miller*:¹ "No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, and at the same time, according to the fiction that in succession after death *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law." The conflict is limited to the domicile of debtor and creditor. The mere physical presence in a sovereignty of the evidence of a chose in action belonging to a deceased will not uphold its taxation there. Thus the notes made in Ohio and there payable belonging to the estate of one who died domiciled in New York could not be taxed in Indiana, merely because they were in the hands of an agent of the deceased domiciled there.²

¹ *Blackstone v. Miller*, 188 U. S. 189.

² *Buck v. Beach*, 206 U. S. 392.

Within the sovereignty the place (county) of assessment may be involved in doubt. The authorities are somewhat divided on the proposition whether the personal property of the decedent should be taxed at the place of the domicile of the decedent, as is held in some States, or, as seems to be the more general rule, in the county where the executor or administrator resides.

§ 320. **The Succession Tax.** — Of growing importance in recent years is the subject of succession or inheritance taxes, which many or most of the States have provided for by statute. On several occasions similar laws have been enacted by Congress, but later repealed. The constitutionality of these laws, both under congressional and State enactments, has been challenged in many cases and in several instances the respective acts were held void on various grounds.

But the current of authorities has vindicated this species of taxation beyond serious question of its validity when the acts imposing it are drawn without violating technical constitutional requirements.

The inheritance tax is not upon the property or estate of the deceased, but upon the right of the beneficiary to take by succession.¹ The property upon which the State tax may be made payable includes all such real and personal estate, situate in the State where the administration is had, as passes from the deceased testator or intestate to the beneficiaries, whether under a will or the Statute of Descents and Distributions. The tax may be imposed, whether the beneficiary resides in the State or in a foreign jurisdiction; or even against non-residents alone. The personal property of a deceased resident is subject to appraisal for taxation though it be situated in a foreign jurisdiction, if it is not needed to satisfy local indebtedness there; but real estate, not being drawn to the domicile of the owner for taxation, or any other purpose, the imposition of a tax upon it in another State transcends legislative power and cannot be enforced.

The personal property of non-residents is subject to the tax, notwithstanding the maxim that personal property follows the owner's domicile (which, it has been said, does not apply to

¹ *Plumber v. Coler*, 178 U. S. 115.

questions of revenue); but only if the property is regarded as having a situs in the taxing State apart from its owner.¹

Property, though exempt by the general law from taxation, such as government bonds or similar securities, life insurance, orphan asylums, and other charitable institutions, are nevertheless liable to the inheritance tax, unless exempted by the statute imposing the tax.

Neither the United States, as a body corporate and politic, nor a municipality or corporation, is exempt from the succession tax.

By the terms of most of the statutes on this subject, the duty to pay the legacy or inheritance tax is imposed upon executors and administrators, except the tax on real estate in States in which no title or right of possession to the real estate passes to them. In such States they have no right or duty in respect of the real estate, and have not the right to pay the tax thereon out of the personalty. It is the duty of the executor or administrator to deduct the amount of the tax out of any legacy or distributive share before he pays out the same; and if the legacy or property be not money, it is his duty to collect the same from the person entitled to the legacy or property, before he delivers it. But he can deduct or collect only from the property in his hands: he can maintain no action against the legatee for the recovery of the tax on personal property. While the legacy or succession tax subjects the property to a lien, it does not create a personal liability on the part of the legatee; and the person having the property in charge is liable only as pointed out by statute; if demand is provided for, there is no liability until there is neglect or refusal to pay "after demand."

The tax on property other than money is determined by the appraisement of its value. Appraisers appointed under the statute imposing the inheritance tax are required to appraise, not the estate of the decedent, but the estate inherited or created by will, subject to the tax.

Property should be assessed at its fair market value, — its cash value, which terms, with reference to the appraisement for taxation, are held to mean the same thing. Debts of the deceased must be deducted; the tax is assessable only on the clear

¹ *Bristol v. Washington Co.*, 177 U. S. 133.

value, which means the surplus after paying debts and legal charges against the estate. When an estate for life or years is created, its value is ascertainable at once, and may be computed, if a life estate, by the life or mortality tables in use by the court. As to future estates, where the tax is payable when the legatee or distributee becomes "beneficially entitled in possession on expectancy," as it is under the statutes of most States, these words are construed to mean, when the beneficiary is entitled to the possession thereof. In the language of Judge Finch, "the State will get its tax when the legatees get their property."¹ So under the last Federal inheritance tax it was held that even a vested remainder was not taxable till the expiration of the prior estate when the beneficiary entered into enjoyment of the property,² and the same interpretation has generally been given to the statutes of the States.

Notice must be given of the appointment of appraisers, so that the parties interested may be represented in the proceeding.

Gifts *causa mortis* are subject to the inheritance tax, but not gifts *inter vivos*.

The homestead for the surviving family of the deceased and the statutory allowance for the maintenance of the widow and family are held not to pass to the beneficiaries by inheritance or devise, but directly by force of the law, and hence have been excluded from the operation of inheritance and succession taxes.

§ 321. **Transfer of Personalty by Personal Representative at Common Law.** — Since the legal title to all personal property vests in the executor or administrator (which title he however holds as *quasi* trustee for parties interested in the estate), as a matter of common law, apart from statutes, a sale or conveyance by the personal representative passes a good title to the personal property of the deceased. The rule covers a negotiable paper as well as goods and chattels.

So the assignment of a mortgage by the administrator to a third person, and by the latter as part of the transaction back to the administrator, is good as between the parties and is attackable by the next of kin simply on the ground that a

¹ Matter of Hoffman, 143 N. Y. 327.

² Vanderbilt v. Eidman, 196 U. S. 480.

trustee's purchase of trust property can be avoided at the will of the beneficiary.

If the personal representative misapplies the assets received under a sale, he commits a *devastavit*, and parties interested in the estate must look to him and the sureties on his official bond for indemnity. The transferee takes a good title.

But since the personal representative is only a trustee, so far as the present inquiry is concerned, the purchaser can be held liable on behalf of beneficiaries of the estate whenever the personal representative abuses his trust as in similar cases under the law of trusteeship. If a purchaser has notice of a dishonest purpose on the part of the administrator to misapply the funds or property of the estate, the vendee is liable to make restitution to the persons entitled to the estate. Nor can the administrator make a valid sale or pledge of the assets as security for or in payment of his own debts.

§ 322. **Restraint on Power of Sale by Statute.**— But this common-law doctrine is inapplicable in many of the American States by reason of the provisions in the statutes of most of them, according to which neither executors nor administrators are permitted to sell property, unless directed in the will, without an order of court; in some of them, the statute itself declares all sales made without such order to be void. And it has been held in a few of the States, that the power of the probate court to order the sale of personal property of decedents' estates, being derived solely from the statute, is specific and limited, and that therefore an order of sale based upon a petition which does not allege or show the existence of a legal cause for the sale is a nullity, as the court has no jurisdiction to make such order. In several States the statutes declaring that the executor or administrator must procure an order of court to sell personalty are construed to affect only visible, tangible personalty, and that the executor's or administrator's rights concerning the alienation of choses in action are still as at common law.¹

§ 323. **Sale of Perishable Property.**— The personal property of an estate which is of a perishable nature, liable to loss, waste, or depreciation, should be sold as soon after taking charge of

¹ For details, see Woerner on Administration, § 331.

the same as reasonable diligence and compliance with the statutory requirements will render feasible. The statutes of all the States, with the exception of only one or two, enjoin the early sale of perishable property as a duty upon executors and administrators; in some of them the directions are very elaborate and minute, in all of them sufficiently full to enable executors and administrators to proceed without incurring any risk or liability on the score of ignorance of the law. In general, an order of the probate court for the sale is requisite, based upon a motion or petition of the executor; but such petition is not required to set forth the jurisdictional facts in accurate or technical language. If the administrator neglect to obtain such order in due time, he will be personally liable for any expenses growing out of the delay, as well as for the loss of the property or its depreciation in value. If the administrator acts in good faith for the best interest, in his opinion, of the estate, without violating the direct provision of the statute or order of the court having jurisdiction, and permits property to remain unsold which is not likely to depreciate in value, he will not be held responsible for an unforeseen loss arising.

§ 324. **Method and Notice of Sale.**—After mention of the special case of perishable property, it is to be noted that the statutes usually contain full provisions for the sale of all personalty. These sales in the American States are generally required to be public, to the highest bidder, unless for good cause shown, the court authorize a private sale. In some States private sales are, or at least were, interdicted entirely. In most States, however, an order to sell at private sale may be obtained from the probate court upon application and proof that the interest of the estate would thereby be enhanced or protected.

The statutes require full notice to be given of all public sales, generally prescribing the time and manner thereof, the minimum of time varying between ten days and four weeks, and the mode being publication in some newspaper, or posting the notice in a number of public places, or both; and in several States both the time and manner of the notice are to be determined by the order of the court.¹

¹ The rule in different States is laid down in Woerner on Administration, § 332.

§ 325. **Terms and Method of Payment.** — The terms of sale, when not fixed by statute, are generally left to the discretion of the administrator, or made part of the order directing the sale. In most cases the statute fixes a maximum beyond which credit is not allowed to be given, generally twelve months. An administrator has no right to alter the terms of an order of sale; but if he does, the irregularity is cured if the court approve the sale, upon a report reciting the terms upon which the sale was had.

Security for the purchase-money must be taken by the executor or administrator in making sales on credit. If the administrator neglect to take such security as the statute requires or the order of court prescribes, he becomes liable to the estate on his bond for the amount of such purchase-money, whether he recovers from the purchaser or not. And so if he neglect to make demand of, or bring action against, the sureties. But the omission to take security does not vitiate the sale. If the security taken was good, and in accordance with the statute or order of the court at the time it was taken, a subsequent failure or insolvency of the sureties will not render the administrator liable, but the loss will fall on the estate.

The price for which property of an estate is sold is not due to the administrator in his individual capacity, but to the estate. The object of the sale is to convert the property of the estate into cash for the purposes of administration, and when so converted it constitutes assets of the estate in place of the property sold. Hence a creditor of the estate cannot deduct from the price of the property sold to him by the administrator the amount of his demand against the estate, unless his claim has been adjudicated, and the amount to which he is entitled from the estate ascertained, in which case the smaller sum may be deducted from the larger. When an administrator has sold on credit, he may nevertheless receive payment at once, since to convert into cash is the paramount object of the sale. If he takes a note payable to himself, he is liable for the amount thereof to the estate, as for *devastavit*, but the contract is valid between the parties, and the maker cannot set off against it a claim purchased by him against the estate. And if the administrator, without sanction of the court, receive, in satis-

faction of a debt due the estate, an assignment of a claim against a third person, he becomes liable for the debt personally.

§ 326. Purchase of Personalty by the Executor or Administrator himself. — It is an ancient and very familiar doctrine, that the sale by an executor or administrator of property of the estate to himself, either directly or indirectly, whether at private sale or public auction, no matter how honest, open, and fair, may be avoided at the option of the beneficial owner, or *cestui que trust*.

This doctrine applies not only to personal property of the estate, but applies equally to real estate whenever it becomes necessary to sell the latter in course of the administration. In order to avoid repetition the subject of the purchase by the representative at his own sale is deferred to a later section.¹

§ 327. Record and Report of the Sale. — It is, in most States, made the duty of executors and administrators to employ a sworn clerk to keep an account of sales, with a list of the articles sold, their price, and the names of the purchasers, which they must report to and file in the court of probate within a given time. In some States they are also required to employ an auctioneer to cry the articles. It is, in general, a wise precaution to report all private as well as public sales to the court, whether made under the order of the court, or by virtue of statutory provision, or by direction of the will, or in pursuance of the common-law right to do so, and whether such report is required to be made by statute or not. The report is valuable as informing the court and parties in interest of the progress of the administration; the approval of the transaction by the court may sometimes afford a protection to the administrator, and in any event affords evidence which may be decisive in an action, and often prevent litigation altogether. The report should be confined to the matter of sale alone; for if it embody other matters its approval may mislead as to its effect upon them, the judgment being final with regard to the sale only.

§ 328. Duties in Respect to the Investment and Custody of Funds. — The probate court has no power to deprive an administrator of the custody of the assets by an order directing him

¹ See *post*, § 487.

where and how he shall keep them. But executors and administrators should preserve the property of the estates intrusted to them separate and apart from their own, to give it an earmark, so that it may always be known and readily traced. The violation of this duty is a breach of trust, which often entails pernicious consequences upon the executor or administrator, although acting in perfect good faith. If he deposit the money in bank, together with money of his own, so that he may draw against the common fund in his own name, or in any manner mingle it with his own, this amounts to a conversion of the estate's money to his own use; the loss of the fund under such circumstances by failure of the bank or otherwise must be borne by him, even if he had no other funds in such bank, and informed the officers at the time that the funds were held in trust, and although deposited with the intention to keep it there to repay the amount of trust funds used by him. Nor should the executor or administrator employ the assets of the estate in his own business, or in speculations on his own account. This would constitute a clear breach of trust, and is in some States made felony by statute. For property tortiously converted, he is liable at its highest value. An executor or administrator, like a guardian or other trustee, is not allowed to reap any gain, profit, or advantage from the use of the trust fund.

Funds in the hands of executors or administrators, which are not immediately or within a short period applicable to the payment of debts or expenses of administration, should be invested so as to produce interest for the estate. Provisions requiring such investment are found in the statutes of many States; and even in the absence thereof it is the duty of executors and administrators, as of all trustees having funds in custody which are not payable to the beneficiaries until after the expiration of a considerable time, to make them productive by investment on safe security. Where the statute directs the method of investment, it is obvious that a compliance with its provisions will protect the executor or administrator against any liability, although the fund may be lost. On the other hand, if the statute is not complied with, the executor or administrator is liable to the estate for any loss, no matter how honestly he may have intended, or how vigilant his conduct may have been.

The statutes are, in some instances, highly penal, and are rigidly enforced.

In the absence of statutory provision touching the method of investment, executors and administrators are bound to employ, in the investment of the funds of the estate, such prudence and diligence as in general prudent men of discretion and intelligence employ in their own affairs. He must act strictly within the line of his duty, whether indicated by the statute, or by the instruction of the court, if there be any such given by a court having jurisdiction, or by the provisions of a will; for any loss arising out of any deviation therefrom, although in perfect good faith and with the best intention, he is liable. If he omits to observe the direction of the will touching the investment of the money, he will be liable for such interest as the investment directed in the will would have produced. It has been held that, where the will directs a legacy to be put at interest, the purchase by the executor of bank stock is not in compliance therewith.

But acting in good faith within the requirements of the law, executors and administrators will be treated by the courts with liberality and tenderness; they will not be held responsible for losses in the absence of wilful misconduct or fraud, especially when acting under advice of counsel. The executor or administrator will not, in such case, be held responsible for losses occasioned by mere error of judgment. And where he has acted with what men of sense and experience would deem reasonable discretion in their own affairs, his acts or omissions in good faith will not render him liable for losses arising in consequence, especially during a period of doubts and difficulties. He is not to be held liable as an insurer of the estate.

Executors and administrators are liable for all losses arising to the estate out of their acts in bad faith or negligence. It is negligence to loan money of the estate without taking security, although done in perfectly good faith, and though lent to a borrower who was amply solvent at the time of the loan; so where the security taken is insufficient. Personal security is held insufficient; and even in lending money on mortgage of real estate, a degree of care is necessary, which, if omitted, will render the executor liable personally. He is bound to use ordinary care to ascertain that the title of the mortgage is valid, and that the

property at the time of the loan is such as will be an adequate security for the repayment of the loan and interest when it shall be called in. The criterion of value in such case is the estimate of men of ordinary prudence, who would deem it safe to make a loan of like amount of their own money on the same property; and the only safe practical rule has been held to be not to lend more than from one-half to two-thirds of the value of the mortgaged property, estimated at what it would bring at a forced sale. Nor should a loan on real estate be made on other than a first deed of trust or first mortgage. It has also been held negligence to invest funds in municipal bonds, or bank stocks, or stocks of private corporations, at least if made without an order of court. Government bonds and real estate securities are held to be the only safe investments recognized by courts.

Where investments made by a testator or intestate come into the hands of the executor or administrator, he is required, in determining whether to sell such stock, to act in good faith, and exercise a sound discretion. Although by the light of subsequent events the course determined on may appear unwise, he cannot be held liable for any losses or depreciation of the stock, unless it be found that he acted carelessly or in bad faith. If the testator has given no directions in the will, the ordinary rules of prudence and diligence apply, and the fact that he has invested his property in particular stocks, shares of corporations, mortgages, or other securities, will go far to justify his executor in continuing them.

The general drift of authority and considerations relating to the safety of trust funds seem to indicate that an executor or testamentary trustee should not invest the funds in his custody in mortgages upon real estate situate outside of the State, except in rare and exceptional cases, under unusual and peculiar circumstances. Mortgages taken upon lands of the estate sold, although situate in another State, are among the exceptions.

It has already been mentioned, that where an executor or administrator deposits money in bank in his own name, he thereby makes himself responsible for all losses by the failure of the bank.

Money may sometimes be lawfully loaned to a devisee on the security of his interest in the estate.

CHAPTER XXXVI.

OF THE MANAGEMENT OF THE REAL PROPERTY.

§ 329. **Probate Control over Realty at Common Law and under Statutes.** — At common law the real estate of a deceased person goes directly to the heir or devisee without passing through the custody of the executor or administrator. But it must also be remembered that a testator's will can give title to trustees, and even give powers to executors and administrators without title. Such authority of the personal representative under the will over the realty is recognized at common law. Before touching the questions arising out of the exercise of testamentary power over realty, and indeed as preliminary to the discussion of these matters, the statutory rules giving the personal representative authority over realty independent of any powers in the will must be considered.

The common-law rule that the personal representative has no concern with the realty of the deceased has been changed by statute in every State in the Union. Realty is everywhere subject to the payment of debts of the deceased under jurisdiction of the probate courts. But in determining the powers of the personal representative over realty, it must be remembered that the common-law rule has not been wholly abolished: the varying statutory provisions must be read in the light of that rule.

The statutory provisions looking toward control of the realty in administration vary greatly as between the States, but may be grouped in three classes, based on the basic idea of the respective legislation.

I. A few States approximate, without fully effectuating, the idea that there should be no distinction between realty and personalty: that the personal representative takes charge of the realty, as he does at common law of the personalty.

II. Another group of States, more numerous, gives no direct right or title to the personal representative, but does give him a power under certain contingencies (generally in interest of the creditors of the deceased) to take the property, and ultimately sell it, if necessary. In these States the personal representative gets his power from the statute: he does not need an order of probate court to enable him to act.

III. In most States, however, the personal representative can only act on an order of the probate court, obtained as provided for in the statutes.

It is not claimed that every State falls absolutely into one of these three classes. There is much patchwork in the legislation. The classification, however, seems not only sound, but practically adequate.

§ 330. I. **The Common Law almost wholly abrogated.**— In this first class of States the right to the possession of the real estate until the administration is closed, or rather until distribution made, is solely with the representative, whether the estate be solvent or not, and he may without joining the heirs or devisees bring ejectment and unlawful detainer against third persons, or even against the heirs or devisees. Nor can the latter (unless the statute provide otherwise, as it does in most of them) maintain an action to quiet title or in ejectment against third parties before distribution and during the administration, though there be a vacancy in the office of executor or administrator, and in foreclosing a mortgage against an administrator the heirs of the deceased mortgagor need not be made parties, while, on the other hand, the administrator is an indispensable party. In these States the representative is in privity with and represents the owner of the realty; hence judgment in ejectment for or against him has been held an estoppel for or against the heir or devisee; and so in other suits affecting the title to the realty the heir is concluded by the judgment against the administrator. For the same reason where the executor or administrator neglects to bring an action until it is barred by the Statute of Limitations, the devisee or heir is also barred,

¹ The list of States belonging to the three classes above mentioned, numerous authorities, and further detail, appear in Woerner on Administration, §§ 337 and 338.

even though he was a minor and under disability when the cause of action accrued to the representative; the remedy in such case is against the representative on his bond.

But even in these States the heirs and devisees have an interest in the realty such as they would not have in personalty, as illustrated by the holdings that they can sell the realty subject to debts of the deceased, and can maintain ejectment where there has been no administration.

§ 331. II. **States giving Statutory Powers to the Personal Representative.** — In these States the title not only vests in the heir or devisee, but the statutes are construed as giving him the right to assert it with all its common-law rights and incidents until the personal representative effectually exerts the power reposed in him by statute. Hence, until the executor or administrator assert his possessory right, the heirs or devisees may sue for rent, or in ejectment, or maintain action for injuries to the realty after the decedent's death, and, conversely, the executor or administrator cannot do so. The personal representative does not represent the heir, and during such time limitation runs against the heir in favor of third parties in possession. But when he has properly asserted his right to the possession, he may maintain possessory actions in his own name, even against the heirs or devisees, or recover the rents, income, or profits, or for any injury to the land or anything severed from it, or for injuries committed before he took possession and after decedent's death, or maintain an action to enjoin third persons from committing waste.

The power of the personal representative in respect of the real estate in these States is, however, a mere statutory power, given only for the benefit of creditors, and properly to be exercised only when the exigencies of the estate require; hence it is said that, where there are no debts or legacies to be paid, or where it appears that the personalty is sufficient for that purpose, there is no valid reason why the executor or administrator should have the possession of the real estate, and where in such case the property has passed into the possession of the devisees, he has no longer any right thereto. The right to the possession ceases when the estate is settled; hence a lease for a longer period than that during which the

administration continues is voidable at the election of the heirs.

§ 332. **III. Power over Realty through Probate Court.** — In all States which have not adopted the principles set forth in the two preceding sections the executor or administrator is not entitled nor bound to take charge of, nor in any wise to interfere with or protect, the real estate of his testator or intestate, until he is ordered to do so by the probate court, for the purpose of selling or leasing it to enable him to pay debts or legacies. If the personal property is insufficient for such purpose, the real estate becomes assets, by force of statutes in all the States, in the hands of the personal representative. Hence his interest in the real estate before the contingency has arisen which makes it assets in his hands is that of a naked power to sell upon the happening of the contingency; the title and its defence, the rents and profits, the possession and all the rights and duties following from ownership, belong to the heirs and devisees until they are divested by decree or order of the probate court. It follows, that in the absence of an order of the probate court to take charge of the real estate, neither an executor nor an administrator can be called to account by creditors for the value, rents, or profits of real estate, unless power be given in the will to sell, lease, or otherwise take charge of it.

The exercise of this probate authority over realty is reserved for future discussion.

§ 333. **Power over Real Estate conferred by Will.** — It has already been shown, that a testator may confer upon his executor or executors the control over his real estate to the same extent to which the law invests them with power over the personalty, either by vesting in them the title by devise, or a naked power to do what he directs for the purpose of carrying out his will. Apart from statutes, powers over realty, whether given to executors or to others, are strictly construed in England and a few American States. Thus the common-law rule does not permit the exercise of a naked power by one of several to whom it is granted: they must all join in the act. Hence if one of several donees of a power die before executing it, or refuse to act, the power must fail. By statute, and under decisions, however, the rule of strict construction as to powers has every-

where been modified, and an interpretation adopted which makes the effectuation of the purpose of the donor of the power the leading consideration.

Where such power over land is created by a will, the question will arise whether the power is personal in the donee named, or whether it attaches to the office of executor. If the power is annexed to the office, it follows it, so that whoever administers the estate is also bound to execute such power, whether it be the executor or executors nominated in the will, or any smaller number of them, or an administrator with the will annexed. If the power is in the individual, not the official, it does not follow the office.

If the testator has not clearly indicated the person charged with the execution of the power, and the question arises whether the person administering is authorized to execute the same, it will be generally sufficient to ascertain whether the proceeds of a sale, or other fruit of the exercise of the power, are distributable by the executor or administrator: in such case the power is in him by implication, and will go to any personal representative upon whom the administration may devolve. But where the power is not clearly vested in the person administering, and the purpose of the power is to accomplish something beyond the scope of the powers or functions of executors or administrators under the law, it cannot be exercised by the executor or administrator.

The augmentation of the powers of probate courts in this country, enabling them, for the purpose of paying the debts and legacies of deceased persons and regulating the devolution of their property, to deal with the real assets of estates as readily as with the personalty, has tended greatly to lessen the difficulty of distinguishing between powers constituting a personal trust and those annexed to the office of executor or administrator, and the differences in the adjudications seem to affect only details. As a general rule, whenever it becomes necessary to convert the real estate of a decedent into money, in order to raise funds for the payment of debts or legacies, it becomes the duty of the personal representative to act in this respect: under power in the will, if such be given; or under order of the probate court, if not, or if the power granted be

inadequate, or if the executor or administrator neglect to act under it. The rule, that the power to sell land does not exist in the executor unless he is directed to do so by the will, either expressly or by implication, is fully recognized; but it is not controverted in any of the States, that if the executor is directed by the will or bound by the law to see the application of the proceeds of the sale, — or if the proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, — the power of sale is conferred on him by implication, because without the exercise of such power he could not execute the will. Thus, where the object of the power is to mix together realty and personalty in a common fund, out of which the various purposes of the will are to be satisfied, including that of the payment of debts, the power is annexed to the office of executors, and will survive to any of a greater number named as donees of the power and executors; and the power will be extinguished with the cessation of the office. Where the will imposes upon executors the duty of selling real estate, without discretion, the power follows the office; otherwise the will must fail, if the executors, or any of them, should die or refuse to act. In such case, the direction to sell works a constructive conversion as pointed out in § 336.

§ 334. **Power given in a Will not following the Office of the Executor.** — The statement of the rule commented on in the preceding section involves, as a correlative thereto, that where the power of the executor to sell is not coupled with an interest, and the direction to sell is not peremptory, but referred to the discretion of such executor, the power is a personal one, and does not follow the office.

It is also to be observed that the conveyance of a power to the executor of the will does not necessarily annex such power to the office; it may be that the word "executor" is *descriptio personæ*, simply employed to designate the donee of such power in trust, instead of repeating his name; and if such appear to be the testator's intention, — where, for instance, the power given is founded in the personal confidence of the testator in the person whom he nominates as executor and trustee, — the administrator with the will annexed will not succeed to the

same. Hence, one named as executor and trustee may qualify as executor and refuse the trust, or accept the trust and renounce as executor; but where the trust is annexed to the office of executor, the executor, if he qualifies as such, thereby accepts the trust. If the same person be both trustee and executor, the probate court has control over him in his executorial capacity, but has no jurisdiction to execute the trust, which must be done in chancery.

§ 335. Statutes regulating the Power over Real Estate conferred by Will. — Under the construction put in England on the Statute 21 Hen. VIII. ch. 4, where part of the executors who have the power refuse the office and the residue accept, the bargains and sales of those acting are good in law as if joined in by all the appointees of the power. The American statutes mostly extend the power to the survivor or survivors of several executors who have qualified, of whom one or more may die, resign, or be removed; as well as to one or more who may qualify of a larger number to whom the power is given, of whom one or more may refuse to act; and to the administrator with the will annexed.

A discussion of the variations in the States goes beyond the scope of this treatise.¹

§ 336. Constructive or Equitable Conversion. — It seems most convenient to notice in this connection the doctrine which impresses upon real estate, directed by a testator to be sold for the purpose of distributing the proceeds to the persons designated by him, the character of personal property, and upon personal property directed to be converted into real, the character of real property. The rule invoked by this doctrine is, that in equity property will be treated as being already what the testator intended it to become. If the conversion is complete, out and out, or absolute and for all purposes, it operates immediately upon the death of the testator, and therefore determines the devolution of the property to the heir, devisee, or executor, — not according to the character in which the testator has left it, but according to that into which he has directed it to be converted; and the rights and liabilities of those interested in it attach from the moment of the testator's death, as if it were

¹ For a more extended discussion see Woerner on Administration, § 341.

then converted, no matter when the actual conversion takes place. Where for instance an executor is directed to sell land and divide the proceeds among aliens, who are capable of taking personalty, but not of taking realty, these aliens take their share in the proceeds of the sales, the land being treated as personalty at the testator's death.¹

But since, as in other cases of testamentary disposition, the testator's intention must govern, if it can be ascertained from his language, the rule is equally applicable whether there be an express direction to convert, or whether a conversion is necessarily implied. There must, however, be no doubt of the testator's intention to convert; and this intention, whether expressed or implied, must be unconditional. A conditional conversion is not within the scope of the rule, because in such case there is no constructive conversion. Thus, if the testator vest power in another to convert or not, in his discretion, or directs the conversion upon the happening of a contingency, or at the election of a person or persons named, it is clear that the question of conversion must depend on the exercise of the discretion, or the happening of the contingency, and cannot be ascribed solely to the testator's will. In such cases the property devolves in the shape in which the testator left it, and the conversion takes effect upon the happening of the contingency. It should be remembered, however, that, where there is an imperative direction to convert, the discretion given as to the *time* of sale, or the mode and manner, does not work an exception to the rule; but if the conversion is postponed to a future time certain, before the arrival of which the property is, according to the testator's direction, to be enjoyed by persons other than the ultimate beneficiaries, there is of course no conversion until the expiration of such time.

It results from these principles, that if the testator intended the conversion for certain purposes only, the conversion is limited to these purposes, and the property not needed for their accomplishment remains unchanged and unaffected by the rule of conversion. So, if the purpose of the testator fails, or cannot be accomplished, there is no conversion, because "there is an end of the disposition when there is an end of the purpose

¹ *Greenwood v. Greenwood*, 178 Ill. 387.

for which it was made," unless the testator intended to stamp the character of personalty upon realty, or *vice versa*, not only for the purposes of the will but for all purposes, out and out.

Where a conversion is directed, but the proceeds go to the same persons, in the same proportions who would take if there were no conversion, they may elect in which character they will take. In such case they take by their own act, as upon a purchase, and not under the will. But all the beneficiaries must acquiesce; a part of them cannot elect. In case the beneficiary be an infant, a court of equity may elect for him, if it be to his interest, but his guardian or trustee cannot.

It may be proper to mention, also, that real estate, although it be constructively converted into personalty, is nevertheless subject to the rules of law governing real estate generally, inasmuch as it is taxable, and controllable as such, and can only be conveyed as such.

§ 337. Duties and Liabilities arising to Executors and Administrators in Respect of Real Estate. — If the real estate of a decedent, in the absence of a contrary testamentary disposition, and when not needed for the payment of debts, passes directly to the heirs or devisees, it is as much beyond the authority and duty of the personal representatives as if it had not been the property of the testator or intestate. Where the executor is given by the will a naked power of sale, the heir or devisee is entitled to the rents and profits until the sale. And actions concerning the realty should be brought by and against him and not the personal representative.

The duties and rights of executors and administrators in respect of real estate lawfully in their charge — whether by force of testamentary direction, or order of the probate court when necessary to pay debts, or coming to them in the course of administration like personal property constituting assets — are the same as if it were personal property under their charge. They are entitled, on the one hand, to credit for all expenses reasonably incurred in its protection and preservation, and liable, on the other, for all losses arising out of negligence in regard thereto. Thus, it is the administrator's duty to restrain even an heir from trespassing upon real estate mortgaged to the intestate, upon which the administrator has obtained judgment

of foreclosure; to bring an action against a disseisor to recover possession thereof; and to recover damages for trespass upon lands of which he has taken possession as administrator. It is hardly necessary to mention, that executors vested with power to sell real estate are, in the same manner, authorized to do all that is necessary in the way of insurance, superintendence, repairs, and paying taxes for the preservation of the estate.

§ 338. **Power to Mortgage the Real Estate.** — It may be stated, as a general proposition, that neither executors, unless specially thereto authorized by will, nor administrators have the power to bind the estate of the deceased by borrowing money. Courts of equity have authorized the mortgage of real estate to raise money for the payment of debts of a deceased person; but it seems that, where the jurisdiction over estates of deceased persons is confided to probate courts, the power of courts of equity is thereby excluded. In some States the statute authorizes the sale *or mortgage* of real estate for the payment of debts of deceased persons; but without statutory provision to that effect courts of probate have no power to order or authorize an executor or administrator to mortgage the real estate; hence a mortgage authorized by a court not having jurisdiction, or in a proceeding in which the requirements of the statute have not been observed, is void, and cannot bind the interests of the heirs, unless they are precluded from objecting by the doctrine of estoppel.

The power to sell real estate given in a will does not necessarily include the power to mortgage it. Such a power must be exercised to the extent and in the manner specified; it must accomplish the purpose had in view by the testator. Hence the direction to sell out and out, or for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage, because the testator's intention, the object to be accomplished by the power conferred, is the conversion of the property. And it is held that a trust with a power to sell imports, *prima facie*, a power to sell "out and out," and will not authorize a mortgage, unless there is something in the will to show that a mortgage was within the intention of the testator. If, however, the conversion be subservient to some other purpose or object, for instance, the raising of money for a spe-

cific purpose by the sale of real estate, the power to sell is held to include the power to mortgage, if the intention of the testator is thereby fully accomplished. It is said, in such case, that the power to sell includes the power to mortgage, because a mortgage is but a conditional sale.

PART III

OF THE PRIVY AMONG EXECUTORS OR ADMINISTRATORS
OF THE SAME ESTATE.

CHAPTER XXXVII.

UNITY OF ESTATE AMONG EXECUTORS AND ADMINISTRATORS OF
THE SAME DECEDENT.

§ 339. **Power of Co-executors to bind Each Other by Acts of Administration.** — The title of co-executors and co-administrators to the assets of the estate is joint, not joint and several. If one or more of the number die, resign, or be removed, the estate passes to and vests in those surviving or remaining. From this joint title it results that suits at law for the estate, including recovery of choses in action which belonged to the deceased, can only be brought by all the executors or administrators. A suit by less than all would be open to a plea in abatement. On the other hand, apart from suing, all have equal authority, and any one or more can dispose of assets; and such acts are binding upon all the others, though they were not concerned therein. Thus sales of chattels, assignment of notes, compounding of debts, and submission of matters to arbitration are binding, though done by less than all the executors or administrators, to the same extent as if done by all.

As the payment of a debt by one of several executors or administrators is necessarily a discharge to all, so the payment of a legacy by one releases all the others from liability therefor, even if payment was by a note, and the maker became insolvent without discharging it. So the delivery of property to the legatee by one precludes the other executor from further authority over such property.

§ 340. **The Liability of one Co-executor or Co-administrator for the Acts of Another.** — Since each of several executors or ad-

ministrators has full power to reduce to possession all assets and collect all debts due to the estate, and is responsible for all assets he receives, payment to him will discharge the debtor. But payment of money or delivery of assets by one co-executor or co-administrator to another does not discharge him. Having received the assets in his official capacity, he can discharge himself only by a due administration thereof in accordance with the provisions of the will or the requirements of the law. Co-executors and co-administrators are not liable to one another; but each is liable to the beneficiaries of the estate, whether creditors, next of kin, or legatees, to the full extent of the assets received.

Ordinarily, one joint executor or administrator is not liable for the assets which come into the hands of another, nor for the laches, waste, *devastavit*, or mismanagement of a co-executor or co-administrator; unless he consent to or join in any act resulting in a loss to the estate, in which case, though the loss be the direct consequence of the default, carelessness, or mismanagement of the other, they will all be equally liable. So if he carelessly permit the co-executor to mismanage or waste the estate, he becomes liable. What constitutes such negligence as to make one liable for the *devastavit* or mismanagement of the estate by his co-executor or co-administrator, must always largely depend upon the circumstances of each case.

§ 341. Remedies in Protection of Co-administrators against Liability for One Another's Acts. — It follows from the unity of the estate of several executors and administrators, which is such that in relation thereto they are all considered as one person in law, — *first*, that each has power to take possession of the assets, which neither of the others can hinder, and that, having taken possession, neither of the others can take them from him; and, *secondly*, that they can neither contract with one another, nor bring an action at law against one or more of their number, because a man cannot be both plaintiff and defendant in the same cause, and in bringing an action all must join as plaintiffs. Now, it would be clearly irrational and unjust to hold any person responsible for the acts of others which he can neither control nor prevent, and equally unwise and unjust to dispense with any of the elements of protection to the estates

of deceased persons which the vigilance, prudence, and good faith of all or any one of the joint executors and administrators afford; hence it is the duty of all and each of them to interpose when any jeopardy to the interests of the estate by the negligence or bad faith of a co-executor or co-administrator comes to their notice. This they may do by invoking the aid of a court of equity, which, upon proof of mismanagement or jeopardy of the estate by any one or more of the executors or administrators, will restrain him from further meddling with the estate, and compel him to restore the funds in his hands, unless a complete remedy is given by statute in the probate court.

Power is now given to probate courts in most States, either to remove or demand bond and security from executors and administrators whenever it be necessary for the safety of the estate; where such is the case, courts of equity will not interfere between co-executors, unless it be absolutely necessary for the purposes of justice; but if there be no adequate power in the probate court, equity will grant relief.

§ 342. **Executor's Executor representing the Executor's Testator.** — At common law the executor of an executor, how far soever in degree remote, "stands as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor."¹ Hence the executor of the executor takes the uncompleted administration of the original testator's estate by operation of law.

The common-law rule in this particular is abolished by statute in nearly all the States.² In this country, therefore, the general statutory rule is that upon the death of an executor, as well as for the vacation of his office for any other reason before the estate is fully administered, an administrator *de bonis non cum testamento annexo* must be appointed, upon whom devolve all the powers of the deceased executor.

§ 343. **Succession in the administration at Common Law.** — The administrator *de bonis non administratis* (of goods which have not been administered) succeeds to the legal ownership of all personalty of the deceased which has not been administered

¹ Williams Ex. [959].

² For particulars, see Woerner on Administration, § 350.

by prior personal representatives. As to the property of the deceased which remains in specie, unchanged by the prior personal representative, the administrator *de bonis non* everywhere takes title as the representative of the deceased, not as succeeding the prior executor or administrator. As to such assets his position is the same as if he had taken them in original administration. Such assets were never administered. But at common law "all the property which has been mixed with that of a prior executor or administrator, or which has been converted to his individual use, or into another form, in short all property of the deceased which does not remain in specie, is administered and not unadministered property. The former executor (or his estate if he be dead) is liable to creditors, legatees, and creditors only, for his conversion or waste of the assets of the estate, and they can maintain suit against him (or his estate) therefor. The prior personal representative is not accountable to an administrator *de bonis non* for such maladministration or for anything except the goods and personal property of the deceased in his hands in specie."¹

In equity, however, a distinction is drawn between legal and valid acts of administration, and such as are invalid, or fraudulent, as being for the individual benefit of the administrator, in violation of the policy of the law. In such case a court of equity will annul the acts complained of, and subject the property to the control of the administrator *de bonis non*, or even entertain a bill for an accounting.

During one period of English history, administrators as well as executors became the owners of the residuum of estates in their charge; it was very important, then, to cut off the possibility that such residuum should go to a subsequent administrator, by converting the estate, so that, on the death or removal of the executor or administrator, there would be no residuum for the administrator *de bonis non*. Under this condition of things, conversion, whether rightful or wrongful, constituted administration, in the sense of changing the executor's or administrator's title, because that which he first held *in autre droit* by the conversion was made his *in proprio jure*; he took the same title as any purchaser from the executor or

¹ Michigan Trust Co. v. Ferry, 175 Fed. (C. C. A.) 667.

administrator would obtain at a sale of the effects, so that neither a creditor, heir, or legatee, nor an administrator *de bonis non*, could further follow it. Thus it became the rule at common law, that for a wrongful conversion, whereby creditors, legatees, or distributees of the deceased were prejudiced in their rights, they have an action against the wrong-doer for damages, for which he and his sureties, and in some instances his personal representatives, are liable.

§ 344. **Administration de bonis non under American Statutes.** — The historical justification of this rule, however valid in England, does not exist in America, except as an element of the common law; hence, many of the States have discarded the rule itself; in some instances by judicial authority, but most generally by statutory enactments. Administration is, in the States not adhering to the artificial common-law rule, understood to consist in the legal proceedings necessary to satisfy the claims of creditors, next of kin, legatees, or whatever other parties may have any claim to the property of a deceased person; until all such claims are satisfied, — whether of creditors or heirs, the widow or minor children of the deceased, — administration is not completed. Executors and administrators are the functionaries appointed by the law to accomplish this purpose, and are invested with the legal ownership of the decedent's property until it is accomplished. Stripped of extraneous elements and considerations, this is the office of administration, and the scope of power of executors and administrators is commensurate therewith. On this view the administrator *de bonis non* is trustee for the beneficiaries of the estate. The beneficiaries have no direct cause of action against the former personal representative, or his representative, but look solely to the administrator *de bonis non*, and his bond. The administrator *de bonis non* is solely charged with calling the former executor or administrator to account, including recovery for any *devastavit* by the predecessor.

These principles, in derogation of common law, appear in the statutes of most States. In some they are recognized to the full extent. But in most States it will be found that the theory does not apply in every particular. Especially is there difference in determining in whom is the right to call the prior personal rep-

representative to account for a *devastavit*. For details a fuller treatise must be consulted.¹

§ 345. **Privity between Successive Administrators.** — The question of privity between an administrator *de bonis non* and his predecessor, that is to say, the extent to which the one is bound by the antecedent acts of the other, must be determined by the scope and effect of these acts upon the course of the administration. It is well settled, both at common law and in all the States, that acts binding upon the original administrator as acts of administration, by which the right of a debtor, creditor, legatee, or distributee against or in favor of the estate of the deceased is affected, are equally binding upon all successors. To this extent, the privity between them is complete, because what an administrator does lawfully within the sphere of his powers is in law the same as if his testator or intestate had done it, and not to be questioned by any one representing him. This privity does not arise out of any relation between *them* to each other, but is the result of the relation of each of them to the testator or intestate, which, to the extent to which property left by him may come into their hands respectively, is the same in both.

In those States which have augmented the powers of administrators *de bonis non*, the estate comes into their hands affected, nevertheless, by all the rightful acts of the predecessors, including matters of evidence affecting parties in interest. Thus, the presentation to the executor of a claim against the estate is good against the administrator *de bonis non*, and need not be presented anew; and the subsequent resignation of the executor does not impair the value of his written acknowledgment of such presentation.

The proposition stated involves, as a correlative thereto, that the successor is not bound by any illegal act of an executor or administrator; the authority of the administrator *de bonis non* being derived, not from his predecessor, but from the deceased testator or intestate, there is no such privity as will estop the successor from assailing the unlawful acts of his predecessor.

There is some difference in the decisions as to the rights of administrators *de bonis non* touching the contracts made by

¹ See Woerner on Administration, § 352.

their predecessors. It appears, from what has already been said in this respect, that, where the common-law rule is observed, the proceeds of a sale belong to the administrator in his own right, and on his death devolve to his personal representatives. It is obvious that in such case the administrator *de bonis non* cannot sue for the price of the goods so sold; nor for a promissory note made to the predecessor. Nor can execution issue against an administrator *de bonis non*, although he have sufficient assets, upon a judgment against his predecessor, for judgment against the administrator in chief gives no cause of action against the administrator *de bonis non*; nor can a judgment in favor of an administrator be revived against his successor. The rigor of this rule at law induced courts of chancery to adopt a different course, allowing the administrator *de bonis non* to revive suits instituted by the executor, and statutes, both in England and some of the American States, giving administrators *de bonis non* authority to continue suits brought by or against former administrators, and to maintain *scire facias*, writs of error, etc., on judgments by or against them, in so far as they affected the estate under administration; and to this extent establishing privity between successive administrators.

The preceding paragraph, it should be noted, deals with the common-law view of the title of the administrator *de bonis non*. Under the American statutory view, set forth in the preceding section, the administrator *de bonis non* would generally succeed to the rights and duties of his predecessor.

The relation between special administrators, such as those *pendente lite*, or *durante minore etate*, with the administrators in chief are governed by the principles above laid down as to administrators *de bonis non* and their predecessors. These special administrators are in privity with the executor or administrator in chief, to the extent of binding the estate, and hence their successors, by their lawful acts of administration.

TITLE FIVE.

OF THE PAYMENT OF DEBTS BY EXECUTORS
AND ADMINISTRATORS.

§ 346. **Origin of the Common-law System of Paying Debts of Deceased Persons.** — The principal function of executors and administrators is to pay the debts and discharge the liabilities of their testators or intestates. To accomplish this purpose the title to all the personal property of the decedent is vested in them in all cases; as well as, under English and American statutes, a power, contingent upon the insufficiency of the personal property, over the real estate.

A just regard for the rights of creditors produced, in England, the statutes which deprived the ecclesiastical courts of their former substantially unlimited control over the goods and effects of persons dying intestate within their jurisdiction. The common-law courts, and, to a still greater extent, the courts of chancery, then undertook to accomplish justice between creditors on the one hand, determining their relative priorities, and between creditors and the widow and next of kin on the other, assuming a superintending control over executors and administrators at law and in equity, and leaving the ecclesiastical courts with power to do little more than grant probate of wills and appoint administrators. Owing to the heterogeneous elements entering into its inception and development, the system of administration at common law, as affected by English statutes, and particularly its provisions for the payment of debts out of decedents' estates, became highly intricate, costly, and fraught with hazard to even the most prudent and well-meaning executor or administrator. In America this complicated machinery has, in most States, been supplanted by a simple, efficient, and inexpensive system under their statutes, easily understood, in its principal features, by persons of ordinary intelligence, safe and speedy in its operation, accomplishing its purpose at a minimum of cost and litigation.

PART I.

OF THE PRIORITY OF DEMANDS AGAINST THE ESTATES OF DECEASED PERSONS.

§ 347. **Distinction between the Debts of the Decedent and Liabilities contracted by the Personal Representative.** — Before entering upon the consideration of the duties and powers of executors and administrators in respect of the debts of the deceased, it must be observed that the expenses of administration, including the cost of the probate of the last will, if any, and of the funeral of the deceased, necessarily take precedence of the debts incurred by the deceased.

When the services rendered are of value to the estate and the executor is insolvent, an action will lie in equity to enforce payment for such services out of the assets of the estate. This is an application of the doctrine that equity can recognize services in saving a trust fund as the basis for a lien on the fund.

But it is a well-recognized principle, that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased; but in the absence of statutory authority the probate court, as already stated, has no jurisdiction to adjudicate between the personal representative and the creditor.

While it is true that in the absence of statutes no action lies against the estate for services rendered at the request of the executor or administrator, a number of States show a growing tendency to find something in their respective statutes warranting the allowance of such claims for services rendered the personal representative for the benefit of the estate directly against the estate.¹

¹ U. S. Fidelity & G. Co. v. People, 44 Colo. 557, is an illustration. For details of holding in various States, see Woerner on Administration, § 356.

CHAPTER XXXVIII.

OF THE PAYMENT OF LIABILITIES ARISING AFTER THE DEATH OF
THE DECEDENT.

§ 348. **Funeral Expenses Allowable as Incidental to the Administration.** — In America, funeral expenses are sometimes classed with debts of the deceased; and while they invariably take the first rank as debts, yet when so considered and treated, they are necessarily postponed to expenses of administration.

But the cost of burial is also often viewed as an expense of the administration. It is the duty of the executor or administrator to bury the deceased in a manner suitable to the estate he leaves behind him; there is no distinction in this respect between an executor and an administrator; and if this duty, in the absence or neglect of the executor, is performed by another, — not officiously, but under the necessity of the case, — the law implies a promise to reimburse him for the reasonable expenses incurred and paid. But this presumption does not extend to gratuitous services rendered for a deceased friend or relative, such as searching for the remains of a missing person, requesting the clergyman to perform the burial services, writing and sending to the newspapers advertisements for the funeral, depositing the corpse in one's house, and permitting the mourners to assemble there, etc.

In this view, the propriety of distinguishing between funeral expenses as an incident of the administration, for which the executor or administrator who paid them is to be reimbursed in preference to any creditor of the deceased, and such expenses as constituting a demand against the estate, provable against the executor or administrator, becomes apparent. If the latter neither ordered the funeral, nor made himself personally responsible to the undertaker, it would be unjust to hold him liable *de bonis propriis* for expenses incurred or laid out by others. In such case, if all the assets of a decedent are exhausted in the payment of other expenses of administration,

the plea of *plene administravit*, or want of assets, must evidently be admissible in favor of the executor or administrator. As debts, however, they are in all the States preferred to all other debts of the deceased. It is clear that, if the executor voluntarily pay them, he must be allowed credit for the disbursement as an expense incident to the administration, because the funeral is a work of necessity, as well as of charity and piety.

§ 349. **Amount allowed for Funeral Expenses.** — The funeral expenses are to be restricted to the amount necessary to bury the deceased in the style usually adopted for persons of the like rank and condition in society. If the estate is solvent, in which event the expense rests ordinarily on the distributees or residuary legatees, more liberal allowances are passed than in cases of insolvency. But even in cases of insolvency, the strict rules laid down for the protection of creditors in former times have given way to the feeling that reasonable expenses according to the decedent's condition in life should be allowed. The whole matter of the amount of the allowance is one of judicial discretion, hardly permitting of logical analysis, and best studied by illustrative cases.¹

§ 350. **What Items are allowed as Funeral Expenses.** — What kind of items shall be allowed as constituting part of the funeral is a question obviously largely influenced by considerations governing the amount to be allowed. A plain tombstone might properly be allowed an insolvent (though there are holdings to the contrary), while a costly monument, even in the case of a solvent estate, would be in doubt unless all the family approved. Even where the estate is solvent, mourning apparel for the family has been disallowed. Expenses for funeral festivals are not allowed in case of insolvent estates. The expense of communicating intelligence of the death of the deceased to his family, and where the decedent dies away from home, the expenses of transportation of the body to his home should be allowed, to which may be added the cost of a person to accompany the body for the purpose of superintending such transportation.²

¹ For illustrations as to insolvent estates, see Woerner on Administration, § 360; as to solvent estates, § 359.

² Many illustrative rulings are collated in Woerner on Administration, § 358.

The estate is not liable for the funeral expenses of the widow of the deceased; and since the husband is primarily liable for the burial of his deceased wife, it would seem that at common law her estate cannot be held liable therefor.¹

§ 351. Expenses of Last Illness when preferred to Debts. — Expenses of the last illness cannot be classed with those for the funeral, because they necessarily accrue *before* the death, and therefore constitute a debt of the deceased; while the funeral, taking place after, cannot constitute a debt of the deceased, but only of the executor or administrator. It follows that in the account of the executor or administrator he can be allowed credit for expenses of last illness only as for a debt paid, of whatever class the statute assigns to it. In a few States, however, physician's bills and other expenses of the last illness are classed by statute with funeral expenses, and so take precedence of whatever is strictly a debt of the estate.²

§ 352. Expenses Necessary in the Administration of the Estate. — It has already been stated, that for the expenses attending the accomplishment of the purpose of administration growing out of the contract or obligation entered into by the personal representative he is to be reimbursed out of the estate, and that his claim to reimbursement must be superior to the rights of the beneficiaries. The expenses under this category include those paid for probate of the will (as elsewhere discussed), as well in the probate court as on appeal, or other proceeding in a contest, if carried on in good faith; and the executor nominated in such will is entitled to a settlement of his account, and reimbursement for his expenses in preserving the estate and for the funeral, although the will be finally pronounced invalid; and, generally, all expenses necessary in the protection and preservation of the estate, which have been held to include the costs of establishing a claim against the estate. But the general rule seems rather to be that costs incurred by the administrator in defence of claims against the estate, or in prosecuting claims in favor of it, pertain to the administration, and are to be allowed in full; but costs incurred by claimants in establishing

¹ But there are holdings to the contrary, mainly resting on statute. See Woerner, § 358, * p. 762.

² See Woerner on Administration, § 361.

their claims stand on the same footing with the claims themselves.

§ 353. **Provisional Alimony for the Surviving Family.** — The provisions, money, and other personal property set apart under the statutes of the several States for the support of the widow and dependent children during the period intervening before they come into possession of dower or distributive share are also paramount to the claims of creditors of the decedent. The liability of the administrator, in this respect, is purely statutory, as this species of protection to the surviving family is unknown to the common law, as we have in an earlier chapter seen.

The distinction between the provisional alimony allowed to widow and surviving family, and the distributive share of the widow and children, must not be lost sight of; because the administrator cannot be allowed credit in his account as against creditors of the estate, for the disbursements on account of boarding, clothing, or schooling the minor heirs, nor for medical services rendered the family after the death of the deceased, nor for necessities furnished to the widow.

CHAPTER XXXIX.

OF THE PRIORITY OF DEBTS CREATED BY THE DECEDENT.

§ 354. **Priority of Debts at Common Law.** — At the common law the real estate of a deceased person does not constitute assets in the hands of an executor or administrator for the payment of debts unless charged thereon by will; from which it follows that a testator may charge his lands with such debts and in such order as he may prefer. But as to the personal assets the executor or administrator is bound, at his peril, to observe the order of priority in the payment of the debts of his testator or intestate; for if he pay those of a lower rank first, having notice of the existence of debts of a higher degree, he must, on a deficiency of assets, answer to those of the higher degree out of his own estate.

The order in which debts are payable out of a decedent's estate is, at common law, as follows: *first*, debts due the crown by record of specialty; *second*, certain debts peculiar to the English laws and customs, such as debts to the post-office for letters, money due the parish from deceased overseers of the poor, funds in the hands of officers of friendly societies, regimental debts, etc.; *third*, judgments of courts of record (except those of foreign countries), and decrees in equity rendered against the deceased in his lifetime; *fourth*, recognizances before courts of record or magistrates, and securities by statute, such as the statute merchant, statute staple, and the like; *fifth*, debts by special contract under seal, and rent; *sixth*, simple contract debts, those due the crown taking precedence of those due any subject, and damages for injuries to real or personal property of another.

§ 355. **Expenses of Funeral and Last Illness as Debts.** — The order of priority established in the several States differs more or less from that existing at common law, and of course among the States themselves. In all of them, however, funeral ex-

penses (if not treated as incident to the administration, and therefore excluding all debts) constitute a preferred class of debts, ranking first in all States, except North Carolina and Rhode Island.

So expenses of last illness, when treated as debt and not placed with funeral expenses, generally take rank before all other debts.¹

§ 356. **Debts to the Government of the United States.** — Of the debts created by the decedent in his lifetime, those which are due to the government of the United States are payable before all others.

The preference in favor of the United States exists under law of Congress, which overrides the State statutes in the few cases in which they contain inconsistent provisions.²

The act of Congress places all debts due the general government before all other debts whatever, going further than the English rule, which gives judgments of record priority over simple contract debts due the crown, and formerly gave specialty debts due others a similar preference. This priority, however, does not operate as a lien upon the property of the debtor, nor in derogation of a lien existing before his death, nor of the widow's allowance under the State law, and necessarily depends upon notice being given to the executor or administrator, either by action against him or otherwise, in default of which payment to other creditors cannot make him liable as for *deceatavit*. And the priority extends only to the net proceeds of the property of the deceased after payment of the necessary expenses of administration, including taxes and funeral charges, but not expenses of last illness.

§ 357. **Debts to the State and State Corporations.** — In most States, taxes, rates, and other dues to the State rank before debts due the citizens. A noteworthy exception to the general rule in this respect is made by Pennsylvania, whose statute directs debts due the Commonwealth to be paid last.

It is generally held that a claim for taxes is such a one as should be paid by the personal representative even without

¹ For exceptions and statutory modifications in the various States, see Woerner on Administration, § 365.

² U. S. v. Fisher, 2 Cr. 358, 385.

presentation to him or allowance by the court, but that it may also be proved up as a claim against the estate in the probate court like other demands.

§ 358. **Debts owing in a Fiduciary Capacity.** — When property or funds held by the deceased in a trust capacity can be identified, they can be followed in equity even after the trustee's death. They are not assets.¹

When the property or fund cannot be specifically traced and segregated from the decedent's own money or property, it constitutes a debt corresponding to the second grade of debts in England.² But in this country it seems that, without statutory provisions on the subject, no preference can be given to debts of this class over other claims. A few States, however, give such claims priority by statute over judgments and simple contract debts.³

§ 359. **Judgments against the Decedent in his Lifetime.** — Judgments in many States constitute liens on the property of the defendant. In several States judgments are ranked with mortgages, recognizances, and other liens existing against the decedent's property at the time of his death. Under such statutes, the priority accorded them is but the recognition of their quality as *liens* upon the property descending. Hence the priority extends only to the property to which the judgments attach as such lien; and they are payable according to seniority, until such property is exhausted. Unless preferred by the statute as debts of higher dignity, they rank with ordinary debts for such amounts as remain unsatisfied after exhausting the property over which the lien extends. Discarding any question as to lien, under the English law debts of record come next after debts by particular statutes, given as the second class in § 354, *ante*. In a number of States judgments are by statute placed by themselves in a preferred class.

At common law, and in those of the States in which judgments are assigned to a preferred class by virtue of their dignity as debts, they are payable out of the general assets, without regard to their seniority, whether of operative force or dormant,

¹ *Ante*, § 294.

² *Ante*, § 354.

³ See Woerner on Administration, § 368.

ratably, if there are not sufficient assets to pay all of them in full. The reason of the priority accorded to them is to be found in their superior dignity as debts of record, fixed and unquestionable, over mere choses in action. Whether judgments technically not of record (*e. g.*, judgments of Justices of the Peace) are included in this priority is a matter of construction of the local statute. They are not included at common law.

As at common law, so in the several American States, the preference, where it is given, extends only to domestic judgments; those of sister States or foreign countries are placed in the same class with simple contract debts. And so, by the words of the statute, the preference is given only to judgments rendered in the lifetime of the debtor, and extends in no case to a judgment rendered against the administrator.

The common-law rule required executors and administrators to take notice, at their peril, of all judgments of record against the decedent remaining unsatisfied at the time of his death, and the personal representative was liable on these judgments without presentation on constructive knowledge, even without actual knowledge of their existence. The hardship of this rule has led to enactments in various States limiting this liability to judgments of record, evidenced in some official listing provided by statute, which makes it practicable to ascertain all such judgments.

But in the States generally, as will appear more fully hereafter, the judgment creditor must give the same formal notice of his demand as any other creditor. In such States the personal representative is not liable unless such notice is given.¹

§ 360. **Debts by Specialty.** — The preference existing at common law in favor of debts by specialty, as bonds, covenants, and other instruments under seal, over simple contract debts, has now been abolished, it is believed, in all the States but Georgia.

§ 361. **Rent.** — Debts for rent, which at common law take rank with specialties as preferred debts, are accorded priority with varying rank among debts in a few of the American

¹ The various groups of States alluded to are given in Woerner on Administration, § 369.

States.¹ But in the other States no preference is given, it is believed, to debts for rent over other debts.

It is obvious, however, that rents due or accruing upon leases held by the testator or intestate, and extending to a period not determined at the time of his death, may stand upon a different ground from other debts if the leases are beneficial to the lessees. Although the lessors may not have it in their power to enforce the payment of the rent covenanted for in preference to other claims against the estate, yet they may forfeit the lease for its nonpayment; and to avoid such forfeiture, if the estate would suffer loss thereby, it may become the duty of the executor or administrator to pay the rent in preference to other claims. So, also, while a proceeding to recover rent by distress proceedings cannot be commenced against an administrator, the landlord may have a lien upon the crops grown, which gives him a preference over unsecured claims.

§ 362. **Wages.** — Wages due to servants constitute a preferred class of debts in several States, not exceeding, generally, one year in time, and confined to domestic servants and laborers on a farm. In some States the class entitled to this preference is much enlarged. In Kansas for instance it is not confined to house servants, but extends to all wage earners, including a clerk in the store of the deceased. The varying details depend on local statutes, since no such right exists at common law, and are beyond the scope of this book.²

§ 363. **Simple Contract Debts.** — After the preferred debts have been discharged, all liabilities of the deceased, of any kind or nature, not included in one of the preferred classes, are entitled to be paid *pro rata*, except that in some of the States a further classification is introduced, giving claims presented to the administrator within a given period of the administration preference over those presented at a later period. The claims presented within the earlier period must be paid in full, before anything is paid on claims subsequently presented. The subject is discussed hereafter.³

¹ For details, see Woerner on Administration, § 372.

² See Woerner on Administration, § 373.

³ See next section and also *post*, § 520.

PART II.

OF THE COMMON-LAW SYSTEM OF PAYING DEBTS OF DECEASED PERSONS.

§ 364. **Payment of Debts according to their Priority.** — We have already seen, that executors and administrators are bound, in the payment of the debts of their testators and intestates, to observe the order of priority established by law. It is easily understood, that unless this requirement is strictly adhered to, and executors and administrators held to personal liability on their bonds for its violation, the rights of creditors would be imperilled and the policy of the law subverted.

It may not be out of place to remark, that the violation of this rule of law is rarely attributable to bad faith, or a conscious disposition to unduly favor one creditor to the prejudice of another; it arises sometimes out of sheer ignorance of the law, and at other times in consequence of thoughtlessness and lack of caution and foresight. It happens but too often that the assets of an estate fall far short of the expectations of heirs and personal representatives, even after the inventory and appraisement have been filed; and more often still, that the liabilities turn out to be much greater than they supposed. Many estates prove insolvent, which are at first looked upon as ample to pay all debts and leave handsome portions to the heirs; yet executors and administrators often close their eyes to the possible, in many cases imminent, consequences of paying debts indiscriminately. Widows, in particular, zealous to vindicate the good name of departed husbands, eagerly pay all debts as fast as presented, and as long as they have anything to pay with, frequently involving loss to other *bona fide* creditors, themselves, or their bondsmen.

Simple obedience to the law is sufficient to avoid such danger.

CHAPTER XL.

OF THE PAYMENT OF DEBTS AT COMMON LAW.

§ 365. **Common-law Preference among Creditors of Equal Degree.** — As among creditors of equal degree the executor or administrator is entitled, at common law, to pay whom he will first; but if one of several creditors of equal degree sue the executor or administrator and obtain judgment, he must be satisfied before the others who have not obtained judgment; and after notice to the executor of an action commenced against him, he is restrained from making a *voluntary* payment to any other creditor of equal degree. Still, the executor may give preference, even after action commenced by one, to another creditor of equal degree by confessing judgment, although such creditor has not taken out process. So, after action commenced by one, another creditor of equal degree may gain preference by greater vigilance in obtaining, in an action subsequently commenced by him, a prior plea confessing assets to a certain amount. If a creditor file a bill in equity in his own behalf only, and proves his debt and obtains a decree, he must be first satisfied, as if he had obtained a judgment at law; and although the decree cannot be pleaded at law, yet the executor will be protected in paying it, and proceedings against him at law stayed by injunction. If a creditor bring a suit in equity, not for himself alone, but for himself and all other creditors, a decree for an account and distribution will be considered in the nature of a judgment for all the creditors; and although the legal priority of creditors will not be affected thereby, the power of preference no longer exists, because no payment to any creditor, made after notice of the decree, will be allowed.

§ 366. **Right of Retainer at Common Law.** — Under the doctrine of retainer, as known to the common law, executors and administrators retain out of the assets of the estate payment of the debts due themselves from the intestate in preference to

the other creditors of equal degree. Retainer is the legitimate result of the doctrine of priority to the creditor who first brings action, together with the right of preference in the administrator, before action brought. An action by an administrator, in his capacity as creditor of the intestate, against himself, in his capacity as representative of the deceased, would be absurd; the right to prefer, then, necessarily takes the shape of retainer, otherwise he would lose the amount of his own debt, if other creditors brought suit and the estate turned out insolvent. The personal representative can in no case retain against a debt of a superior degree.

The privilege of retainer extends to specific personal property due or belonging to the executor or administrator, as well as to the assets, to extinguish a debt due him.

The right of retainer exists not only in favor of executors and general administrators, but also for temporary or limited administrators. There can be no retainer by the executor or administrator for damages unliquidated or arbitrary in their nature, such as for a tort.

The doctrine of retainer is outlined here as an important element in the common-law system of administration. Under the American system, however, the doctrine is almost, but not wholly, obliterated, as will appear in the later discussion of the claims of executors and administrators.¹

§ 367. Consequence of paying Legatee before Notice of Debt. — The common-law principle subjecting all personal property in the hands of the executor or administrator to liability for the payment of debts of the deceased gave rise to very grave complications, and until the matter was remedied in equity, and subsequently by statutory provisions, produced great hardship to executors and administrators, whenever the question of paying legacies, or delivering the residue, arose in cases where the testator or intestate had entered into covenant, or bond with condition, or the like, upon which liability might or might not arise. It was held, as early as the reign of Queen Elizabeth, that the payment of a legacy was compellable, notwithstanding a bond which had not been forfeited; but, on the other hand, Lord Hardwicke held that payment of a legacy, after notice of

¹ See *post*, § 384.

the specialty, but before breach, was not a good payment. So, even where the administrator had no notice of the existence of the bond, he was allowed for payments to simple contract creditors, but not to legatees. The hardship of this rule of law, holding executors and administrators liable upon remote contingencies, gave rise to the rule in equity, that they could not be compelled to part with the assets, either to legatees or distributees, without sufficient indemnity, or impounding a sufficient part of the residuary estate for that purpose. It was also intimated, that where an executor passes his accounts in the court of chancery, he is discharged from further liability, and the creditor is left to his remedy against the legatees; and that, to encourage this practice, no costs in such case will be visited upon them. The former English system, as above set forth, is necessarily discussed as preliminary to dealing with the existing American system, which is the subject of succeeding chapters. It will there appear in what way and how far the defects of the old English system have been met.

§ 368. Defences against Actions for Debts of the Deceased. — Whatever causes of action survive the death of the debtor, can be brought, as far as common law is concerned, against the personal representative. Each creditor can institute an independent action. Since an adjudication in any one case on a defence, such for instance as the existence of debts of a higher class, is of no force when offered to a suit by another creditor, the possibility, not to say probability, of illogical and unjust results is obvious. The American system, to be examined hereafter, does away with most of these difficulties. But, as has been repeatedly said before, the common law is rarely wholly eradicated; and so it becomes necessary to give a sketch of proceedings at common law upon suits by creditors.

In defence of an action against him, the executor or administrator may, in addition to pleading any matter which the deceased might have pleaded, deny the representative character in which he is sued, or, admitting it, he may plead that he has no assets, or not assets sufficient to satisfy the plaintiff's demand; or he may plead a retainer of his own debt of equal or superior degree; or debts of superior degree to third persons. It is his duty so to plead as to protect all creditors of whose

claims he has notice in their rights, according to the dignity of their debts as established by law, and if he fails to do so he becomes personally liable.

If the administrator has no assets to satisfy the debt upon which the action is brought against him, he must plead *plene administravit*, or *plene administravit præter*, etc.; for a judgment against him, whether by default or on demurrer, or on verdict upon any plea except *plene administravit*, or admitting assets to such a sum and *rien ultra*, is conclusive upon him that he has assets to satisfy such judgment. If he pleads either a general or special *plene administravit*, he will be held liable only to the amount of assets proved to be in his hands. But if an executor confesses judgment against himself, upon a miscalculation of the amount of the assets, which afterwards appear insufficient to satisfy it, he will not be relieved in equity; nor will equity aid him if he could, by reasonable diligence, have ascertained the condition of the estate.

If, in an action against an executor or administrator, which can be supported against him only in that character, he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him must be that the plaintiff recover the debt and costs, to be levied *out of the assets of the testator*, if the defendant have so much; but if not, then *the costs* out of the defendant's own goods. But if the defendant pleads *ne unques executor* or *administrator*, or a release to himself, and it is found against him, the judgment is that the plaintiff recover *both debt and costs*; in the first place, *de bonis testatoris* (or *intestatis*), *si*, etc.; and next, *si non*, etc., *de bonis propriis*.

If the defendant pleads *plene administravit*, and is not proved to have assets in his hands, the plaintiff may confess the plea and have judgment immediately of assets *quando acciderint*, or, as it is sometimes called, judgment of assets *in futuro*, which may be either an interlocutory or a final judgment; if interlocutory, there must be writ of inquiry, or other proceeding to complete it. But if the plaintiff *take issue* on the general or special plea of *plene administravit*, and it be proved against him, he cannot have judgment of assets *quando*. By taking judgment of assets *quando*, the plaintiff admits that the defendant has

fully administered to that time; and since the judgment is to recover of the goods of the testator which shall *thereafter* come to the hands of the executor, proof of the executor's receiving assets is always, at the trial in debt or *scire facias*, confined to a period subsequent to the judgment, or, more accurately, perhaps, to a period subsequent to the issue of the writ.

§ 369. **Effect of Admissions and Promises by Executors or Administrators.** — Admissions or promises made by executors or administrators may be offered either to bind the estate, or to bind the personal representative himself in his individual capacity.

When offered to bind the estate, they can only have that effect when made by the personal representative in his official capacity in the performance of a duty to which the admission or promise is pertinent, so as to constitute part of the *res gestæ*. Under the common-law system of paying debts, which we are now considering, the personal representative deals with each creditor of the deceased directly, and promises so made by him may well be considered as made in the line of his duty and therefore binding on the estate. Thus it is held that the promise by an executor to pay what without such promise is an equitable obligation converts it into a legal obligation, enforceable at law; and that the admission of a former administrator of payments made to him are properly admissible.

It must be noted, however, that under the prevailing American system of paying debts of the deceased, to be discussed in subsequent chapters, the personal representative does not usually allow claims, which are established in judicial proceedings, and pays them only under order of probate court. Under such a system it would not seem in the line of the duty of the personal representative to make admissions (at least extra-judicially) as to the debts of the deceased, and their admission in evidence is doubted or negatived.

"This," says Buck, J., alluding to the statutory jurisdiction of probate courts in the matter of allowing claims, "has changed the rule under the old probate system, where the whole matter of allowing and paying claims against an estate rested with the personal representative, and where, if he did not pay, the remedy of the creditor was to sue him, and where, after he be-

came clothed with the trust, and made admissions in the execution thereof, they were admissible against the estate.”¹

But such an admission or promise may be used as the basis of a proceeding, not against the estate, but against the personal representative individually. Widow and child, administering the estate, are apt to make promises to creditors. Clearly a promise to pay out of the assets, or an acknowledgment of the justice of the claim does not create a personal liability. The liability of an executor or administrator arising out of his own promise to pay the debt of the decedent may, if supported by a sufficient consideration, or if otherwise valid, be enforced against him personally. The surrender of a note made by the intestate, forbearance for a certain or reasonable time to the prejudice of the creditor, the possession of assets, and, *a fortiori*, any services rendered for or goods furnished to the executor at his request, have been held sufficient to support the promise, and make him liable personally. But if made when there are no assets, no other consideration moving to the personal representative, it is void like any other *nudum pactum*. Even when resting on valid consideration, the promise, if verbal, cannot generally be enforced, since it is an agreement which must be in writing under the Statute of Frauds.

It must not be understood, however, that the personal liability of the executor or administrator in any such case operates of itself as a discharge or exoneration of the estate from such debt. As between the administrator and the estate, the debt is still owing; and if the latter properly pay it, he may recover the amount paid from the estate.

§ 370. **Enforcing Judgments de bonis testatoris at Common Law.**— Judgment against an executor or administrator may be enforced in two ways: *first*, by *feri facias*, or *scire fieri* inquiry; *next*, by an action of debt suggesting *devastavit*. If the sheriff returns not only *nulla bona*, but also *devastavit*, to a *feri facias de bonis testatoris*, the plaintiff may sue out execution by *capias ad satisfaciendum*, or *feri facias de bonis propriis*. If he return *nulla bona* generally, the ancient course was to issue a special writ to the sheriff, to inquire by a jury whether defendant had wasted the goods of deceased, and, if *devastavit*

¹ Johnson v. Hoff, 63 Minn. 296, 300.

were found, a *scire facias* issued to show cause why the plaintiff should not have execution *de bonis propriis*; later, however, the inquiry and *scire facias* were made out in one writ, called a *scire fieri* inquiry.

Upon a judgment *quando acciderint* the plaintiff cannot have execution until some assets come into the hands of the defendant, when he may bring an action of debt.

§ 371. **Liability of Executors and Administrators in Equity.** — Prior to the introduction in England of our American system, the usual course for avoidance of the intricacies of the common-law system indicated in the preceding sections was for one or more creditors to file a bill for himself or themselves and all other creditors who should come in under the decree for an account of the assets and a settlement of the estate; or, if assets are admitted, and the debt admitted or proved, to make an immediate decree for payment. Upon admission of assets, the court will immediately order the executor or administrator to pay so much as he admits having in his hands into court. The general rule is, that an admission of assets by an executor or administrator can never be retracted in a court of equity, unless a case of mistake be most clearly established; and if the allegation in the creditors' bill to this effect be sustained, the plaintiff will be entitled to a decree for payment at once.¹

¹ For much fuller discussion of the old system, see Woerner on Administration, Chapter XL.

PART III.

OF THE SYSTEM OF PAYING DEBTS OF DECEASED PERSONS UNDER AMERICAN STATUTES.

§ 372. *Contrast between Common Law and American System.* — It appears from the foregoing brief sketch of the common law applicable to the payment of debts of deceased persons, that executors and administrators are thereby burdened with a grave responsibility, calling for close watchfulness and the exercise of enlightened judgment upon nice and often doubtful points arising upon demands or suits by creditors. A mistake as to the proper plea to be made, or the line of defence to be adopted, or whether defence ought to be made at all, may be fraught with mischievous results not only in the shape of costs and counsel fees, but entailing personal liability, even though there be no assets, or assets not sufficient to meet the judgment rendered. It has also been remarked, that the highly artificial and perplexing system of the common law has been supplanted in most States by statutory regulations, promoting by their simplicity and directness the safe, speedy, and inexpensive settlement of estates, particularly in the matter of paying debts. The power conferred upon probate courts, in most States, to apportion among creditors the assets of the estate, after a sufficient period has elapsed to enable them to establish their claims, and barring them from further proceeding against the executor or administrator subsequently thereto, simply and efficiently secures creditors, heirs and distributees, and executors and administrators in their rights, doing away with the abstruse theory of pleading, and enabling the several issues that may arise in respect of the liability of the deceased, as well as of that of the personal representative, to be tried separately. Persons of ordinary intelligence and business capacity will generally find but little difficulty in complying with the duties imposed

by law upon executors and administrators; and if confronted with questions which they are not able readily to decide, touching the rights of creditors, or the course of their own duty, they should avail themselves of professional advice, at once to protect themselves and their bondsmen, and to secure the rights of creditors and distributees according to law.

§ 373. **Notice to Creditors of the Grant of Letters.** — As the first step toward the satisfaction of the claims against the estate of a deceased person, the statute requires, in nearly, if not quite, all of the States, the publication of notice of the grant of letters testamentary to the executor, or of administration to the administrator. The period within which the publication must be commenced ranges from ten days to four months. The purpose of this notice is to enable creditors to present their demands to the administrator or court, as the case may be. The contents of this notice, and the method and proof of its publication are governed by the statutes, which must be examined in each State.¹

The omission to publish the notice to creditors is attended by serious consequences. In most of the States, though the general Statute of Limitations is not affected, the special bar by limitation in favor of executors and administrators cannot be pleaded by them, when they have failed to publish this notice.

¹ See Woerner on Administration, § 385.

CHAPTER XLI.

OF THE EXHIBITION OF CLAIMS TO, AND THEIR ALLOWANCE BY,
THE EXECUTOR OR ADMINISTRATOR.

§ 374. **Creditors required to exhibit Claims.** — If the executor's or administrator's notice has been duly published, creditors are required to exhibit their claims against the estate to the executor or administrator within the time specified in the notice, or fixed by law, before they can proceed by action. One of the purposes of this requirement is to enable the administrator to adjust the claim without the expense of compulsory proceeding in court; hence, creditors bringing suit before exhibiting their claim to the administrator, or making demand for payment, are liable for the cost of such proceeding. In some States, the plaintiff will be nonsuited, or his action dismissed, if no notice of the claim had been given to, or demand made of the administrator, but even in such States there are rulings which hold that the statute does not apply to cases where the administrator cannot comply with the demand, but an order or judgment of the court is necessary; for it is obvious that in all such cases the exhibition would be but an idle ceremony.

A demand for unliquidated damages would be an illustration. The respective statutes and rulings thereunder must be consulted on this point.¹

§ 375. **What constitutes a Sufficient Exhibition.** — A literal compliance with the terms of the statute is the only course to secure absolute safety to the creditor, and to relieve the administrator from the perplexing doubt, and even personal hazard, which may arise if the sufficiency of the exhibition is not clearly apparent. For however liberally disposed he may be to waive technical defences and to deal with creditors on the basis of substantial justice, he stands as the representative of *all* creditors as well as of heirs, legatees, and distributees, whose technical rights he is not at liberty to disregard.

¹ See Woerner on Administration, § 336.

The utmost strictness is essential where the time of the exhibition of the creditor's claim affects its priority over others. It is obvious that the administrator can exercise no discretion in such case, and that the sufficiency of the exhibition can be tested by the statute alone, because whatever indulgence is extended to a creditor who has not strictly complied with the statutory requirements may — in insolvent estates must — result to the injury of others, who have conformed to the law.

The rulings in the different States vary very much as to the strictness with which the statute on the subject is interpreted. In some States it is held that knowledge on the part of the administrator of the existence of the claim is sufficient to prevent the bar of the statute, and no written notice is necessary. The direct contrary is held in other States.

The revival of an action, abated by the death of the defendant, against his executor or administrator, is equivalent to the exhibition of the demand as of the day when notice of the revival or summons is served upon him; it has been so held even without statutory provision to that effect. Institution of suit against an administrator for a debt incurred by the deceased, although plaintiff suffer a non-suit therein, has been held sufficient as an exhibition with a view to fix the class of the claim. In other States it is held that notice cannot be based on a voluntary non-suit. Indeed, the strict construction view has been pressed so far as to find no excuse for failure to give formal notice in the fact that the administrator was fully aware of the claim, and intentionally misled the creditor, ignorant of his duties, as to the legal requirement for its presentation.¹

The subject of this notice by the creditor cannot be generalized. Each case must be examined under the authorities of the State in question.²

Where the same person administers on the estate of the debtor as well as of the creditor, it is not necessary that a claim be presented to the administrator in one capacity to himself in the other.

The presentation to one of several executors or administrators seems to be sufficient to satisfy the law requiring exhi-

¹ Spaulding v. Suss, 4 Mo. App. 541.

² For many statutory details, see Woerner on Administration, § 387.

bition or notice of the claim before suit can be brought thereon; but this exhibition must not be confounded with the summons or notice necessary to procure the allowance, or to commence an action on the claim, which will be considered later on, in connection with the subject of establishing claims against estates.

§ 376. **Time for the Exhibition of Claims.** — The time within which claims must be exhibited to the administrator begins to run from the date of publication of the notice to creditors, or from the date of the order requiring such publication, excluding the day of the first publication or order, or from the last day of publication; but may be exhibited before, or without, such notice. Where the cause of action arises after the death of the debtor, the time is computed, generally, from its maturity. In some States a saving is also provided in favor of parties who could not be reached by the publication on account of absence from the State.

Provision is made, in some of the States, requiring the administrator to notify all persons holding claims against the decedent to file their claims at a given time with the administrator, or commissioners appointed for that purpose, or the probate court. In most of these States, the court may extend the time so limited, not exceeding, usually, eighteen months or two years. In a few of them, the time may, for good cause shown, be extended beyond two years.

The exhibition of claims, to bring them to the notice of executors and administrators, is to be distinguished from that notice to them the service of which performs the office of a summons, making them defendants in a proceeding to establish the claim, requiring their attendance in court, or before some tribunal having jurisdiction for that purpose. The nature of the notice required in the latter view will be discussed in treating of the establishing of claims.

§ 377. **Affidavit of Creditors Necessary.** — In all but two or three of the States the claimant must aver, under oath, that the amount claimed against the estate is justly due, that no payments have been made thereon, and that no set-offs exist against the same except as stated, before the claim can be allowed.

If the claim is held by assignment after the death of the debtor, the affidavit must be made by both the assignor and

assignee. If required in a proceeding before a court, it need not be in writing, but may be made *ore tenus*, or by the claimant as a witness. An affidavit made during the lifetime of a decedent will not authorize the allowance of a claim, since it might have been true when made and not true at the death of the decedent.¹

§ 378. **Allowance or Rejection of Claims by the Administrator.** — In many of the States, the administrator, being satisfied of the justice of a claim by his own knowledge, or by the affidavit of the claimant, or such evidence as he may deem sufficient, may allow the same without formal judgment or proceeding in court. In a number of States, the approval of the probate court is necessary, in addition to that of the administrator, before it is payable out of the estate; in most of them, however, there must be the judgment of some court of ordinary jurisdiction, or of the probate court, before payment of a claim can be compelled. The previous exhibition to the administrator is, as already shown, a prerequisite to such judgment.

In those States where the administrator has power to allow the claim of his own motion, if he does not deem the claim a just one, or if some person having a legal right to do so objects to its allowance, or if, for any reason, he is unwilling to allow the claim, he should reject it, and remit the claimant to his action at law, or other proceeding allowed by statute, to establish it, and the claimant must then bring his action upon the claim as it was when rejected by the administrator.

If the administrator neither allow nor reject the claim exhibited to him, it is to be deemed rejected. The rejection by one of several administrators is sufficient to authorize a suit upon the claim.

¹ For further details, see Woerner on Administration, § 390.

CHAPTER XLII.

OF ESTABLISHING CLAIMS AGAINST THE ESTATES OF DECEASED PERSONS.

§ 379. **When Claims may be established in Probate Court.** — Having exhibited his claim to the executor or administrator, and failed to obtain satisfaction thereof, either because there is no authority under the statute for him to make the allowance, or because, where he has such authority, he is not satisfied of the justice of the claim, the creditor's next step is to establish it in some court of competent jurisdiction as a valid demand against the estate. The procedure under American statutes differs in this respect from the common-law method of obtaining judgments or decrees against executors or administrators chiefly in the nature of the judgment rendered, which, if in favor of the claimant, is always against the personal representative in his representative character, simply fixing the amount of the demand without reference to the question of assets, and determining its class of priority; leaving the question of liability between the creditor and the administrator in his personal character to be determined by a later proceeding. "It is one thing to obtain an allowance and another thing to obtain a direction for the payment of the claim," pithily says Chief Justice Elliott, of the Supreme Court of Indiana.¹

The procedure in America is still further simplified by vesting the probate courts with power to hear and determine all claims against the estates of deceased persons in a summary manner, without the formality of technical pleading, yet securing to litigants the full benefit of trial before courts of higher dignity by providing for appeals to courts of plenary jurisdiction and a trial there *de novo*.

By these means the common-law right of preferring one creditor of the same class over another; the right of retainer for the administrator's own debt; the artificial system of pleading the existence of a debt of superior dignity in bar of an inferior

¹ Fickle v. Snapp, 97 Ind. 289, 293.

one, or *plene administravit*, or *rien ultra* in case of insufficiency of assets; the marshalling of assets or securities by courts of equity; the technical distinction between pleas admitting or denying assets, between judgments *de bonis propriis* and *de bonis intestatis* or *testatoris*, and judgments *quando acciderint*, as well as the complicated formalities of enforcing judgments against executors and administrators, are swept away. The rights of creditors are thus secured; and executors and administrators relieved of all responsibility except faithfully to present any defence which they may be aware of, on the trial.

In most States probate courts have power to try creditors' claims, but not in all.¹

§ 380. **What Actions and Defences are Triable in Probate Courts.**

— It appears from the discussion of the method of procedure in probate courts, that while they possess no original chancery powers, yet within the scope of the jurisdiction conferred upon them their powers are not confined to either legal or equitable rules, but are to be measured by the statutory grant alone.

It may be observed here, that the spirit of the administration law is foreign to the remedy by attachment against an executor or administrator for the debt of a deceased person; it is accordingly held that attachment will not lie against the assets of an estate for the decedent's debt; nor a summary proceeding to recover rent by distress, nor the summary proceeding by execution to enforce the personal liability of a stockholder in an insolvent corporation. But the power to try claims against the estates of deceased persons includes all actions upon which a money judgment can be rendered, whether growing out of contract or tort, whether legal or equitable in their nature. Thus any action for a wrong to the property rights or interests of another, a false return by the sheriff, conversion of a slave, or of a trust fund, or for the breach of a bond with collateral conditions, is triable against the estate of a deceased person in the probate court.

A court of equity will not, therefore, assume jurisdiction of a claim against an estate until it has been shown that the probate court cannot afford the requisite relief.

Since, as we have seen, judgments of probate courts are not

¹ For lists of such States, see Woerner on Administration, § 391.

collaterally assailable, the allowance of a claim by that court is conclusive and entitles to the same effect as the judgment of any other court.

§ 381. **Claims against Estates of Deceased Married Women.** — The competency of probate courts to enforce liabilities against the estates of deceased married women follows, without special statutory authorization to that end, in all States in which the acts of a *feme covert*, with reference to her equitable property, are held to bind her personally.

Viewed as a personal obligation of the deceased for which her general estate is liable, whether enforceable in legal or equitable form of action, it is a proper subject for allowance in probate courts. Such is believed to be the law in most of the States.

But apart from statutes, a married woman can make no contract at common law. The person who has a claim against a married woman under what would have been a contract if made with one *sui juris*, has his only remedy in equity, so far as the married woman has separate estate, in enforcing a charge, in the nature of a lien, against such separate estate. Where the statute has not modified this law, upon her death, the question arises whether her equitable estate can be made liable to creditors without the intervention of equity. On principle, there seems to be no difficulty in subjecting such property to the control of the probate court; the reason requiring the interposition of equity courts during the existence of the coverture is no longer operative, since the probate court proceeds according to equity as well as law. But the authorities diverge; it is held in some States that the jurisdiction of probate courts is peculiarly adapted to deal with just such cases, while in others their organization is held inadequate to reach them.

§ 382. **Claims not matured.** — In accordance with the policy of speedy settlements of the estates of deceased persons, aimed at in most of the statutory provisions of the American States, most of them require debts payable, according to the contract entered into by the deceased, at a future time, to be presented to the administrator and adjusted before their maturity. To be proved and allowed as subsisting claims, they must constitute absolute debts running to certain maturity, such as promissory notes, and the like.

The terms upon which judgment is rendered on such claims are, usually, that they be allowed for their value at the time of rendering judgment, or upon rebating interest from the date of the judgment to the date of maturity; or the parties may agree either to rebate such interest or let the judgment take effect upon the maturity of the debt; or, if the rebate be not accepted, the court may take bond from the heirs to pay the debt when due.¹

§ 383. **Contingent Claims.** — Claims not absolute or certain, but depending upon some event after the debtor's death, which may or may not happen, are not enforceable against executors or administrators after they have fully administered, without notice that such claim has become absolute. Such claims may generally be enforced against distributees and legatees to the extent of the property received by them from the estate, either in equity or at law, and the subject will be treated elsewhere.² But if such claims become absolute, by the happening of the event upon which they depend, before the executor or administrator has fully administered, they may be presented for allowance, and enforced like other debts of the decedent. The law in most States is, that the Statute of Non-claim, or Special Limitation, begins to run from the happening of the event which fixes the decedent's liability; if the debt is not established against the estate within such time, it will be forever barred. In a number of States the statute authorizes or requires the presentation of contingent claims before they have become absolute, to the administrator, and the court may, if sufficient cause appear, direct the retention of a sufficient sum in the hands of the administrator to pay such claim, either in full, if the assets are sufficient, or according to its *pro rata* share, with the proviso in some of them that the contingency shall happen in a reasonable time. Provision is also made, in some States, enabling the distributees to expedite the settlement of an estate by giving bond for the payment of an inchoate or contingent debt, thus relieving the administrator from further responsibility on account thereof; and in others, contingent claims accruing after the time fixed for the presentation of debts against

¹ For illustrations as to this section, see Woerner on Administration, § 393.

² See *post*, §§ 578-581.

the estate may be satisfied out of assets subsequently received by the administrator; which, however, imposes no obligation upon him to provide for their payment if not exhibited to him before completing the administration.¹

§ 384. **Claims of Executors and Administrators.** — The common-law rule allowing executors and administrators to retain for their own debts in preference to other creditors of equal degree, is repudiated, it is believed, in all the States. In some it is modified only to the extent of requiring them to retain an amount proportioned to what other creditors in the same class may receive. In others they cannot retain without making proof of the validity of their demand before the court, while in still others, if they wish to enforce a claim against the estate in their charge, it must be exhibited to a co-executor or co-administrator, and if there be none, to the court having jurisdiction, with the affidavit required of other creditors, in which latter case it becomes the duty of the judge to appoint some discreet person to act as administrator *ad litem* of the estate and manage the defence.²

§ 385. **Claims of Relatives.** — Ordinarily acceptance of services or goods raises a presumption of a promise to pay by the recipient which is technically essential to recovery. But when claims are made against the estate of deceased persons by their children, parents, brothers, sisters, or other relatives or members of the family, it is, to say the least, possible that the service was rendered or the property given gratuitously. Indeed some cases hold that when such relation is shown there is a presumption to that effect. At all events the claim cannot rest upon the implied promise without some evidence on which to base it. The true rule seems to be, and it is so held in most of the States in which this question has been decided, that there may be a recovery upon an implied contract, if the evidence shows the services to have been rendered, or the goods, boarding, etc., to have been furnished upon the mutual understanding by the parties that compensation should be made by the party receiving the services, boarding, etc. While the mere expectation of compensation on the part of one rendering services, in

¹ See Woerner on Administration, § 394.

² See Woerner on Administration, § 395.

the absence of a corresponding intention to make the compensation expected on the part of the recipient of them, either expressed or inferable from his statements or conduct, does not constitute a contract, and cannot be enforced, yet there may be a contract without a direct promise to pay. It is sufficient to bind the party receiving the services, if he induces them by any statement or conduct reasonably indicating such intention. But the evidence in all such cases should be clear, distinct, and positive.

Statutes providing that in an action brought on a note or other instrument in writing, its execution and signature are to be deemed admitted unless denied under oath, have no application where the party alleged to have signed the instrument has since died; proof of its genuineness must be made. So also where the signature is by mark.

§ 386. **Notice to the Administrator of Claims to be established.**—The distinction must be kept in sight between the exhibition of claims to the executor or administrator, and the notice to him of the creditor's intention to establish them as valid demands in the shape of a judgment or allowance by the court or other tribunal having power to that effect. The former, as already pointed out, performs the office of bringing the existence of the claim to the notice of the personal representative, so that he may have an opportunity of satisfying himself of its validity, and acting accordingly, or in some States, of fixing the class of the claim in so far as this may depend upon the time of presentation; while the latter is equivalent to the service of process upon a defendant, so as to subject the executor or administrator to the jurisdiction of the court or other tribunal, and give validity to the judgment or allowance that may follow. Without such notice a judgment or allowance against the estate is therefore void. The original presentation to the administrator, without the notice that application would be made in court for its allowance, is not sufficient. A claim represented by a judgment obtained against the debtor during his lifetime constitutes no exception; the same notice must be given as required for other claims. Appearance by the administrator, although he has not been served with notice, is construed as a waiver, and confers jurisdiction on the court.

The notice need not be couched in artificial or technical terms; but will be sufficient if it convey to the administrator the information that the claimant demands allowance for the cause of action, which he must set forth with sufficient certainty; and if on a running account, he must attach a detailed copy of the account.

§ 387. **Set-offs in Probate Courts.** — The affidavit required of creditors before their claims can be entertained in the probate court compels them to disclose the existence of any set-off or counter-claim, and the amount for which they can obtain allowance is limited to the difference between the amount claimed and any sum in which they may be indebted to the estate. Hence the judgment can be for the difference only, if there had been mutual dealings between the creditor and the decedent; and this whether the estate is solvent or insolvent, whether the debts are payable simultaneously, or the one *in presenti* and the other *in futuro*, or whether there be other claims superior in dignity thereby affected or not; even if the debt to the estate would not have been the proper subject of set-off during the lifetime of the parties. Administrators, therefore, should, although not bound by law to do so in all the States, exhibit or plead in set-off any debt or liability of the claimant to the deceased against a claim presented for allowance against the estate.

Contingent liabilities cannot, of course, be allowed in set-off.

But the defendant in a suit by an administrator upon an indebtedness accrued after the grant of letters cannot be allowed to set off a claim which he may have against the deceased; because to do so would give him an undue advantage over other creditors, if the estate should prove insolvent.

The administrator may, however, permit the *pro rata* dividend coming to a creditor to be set off against the amount due from him for property of the estate sold by the administrator; and, *a fortiori*, the debtor, in an action by the administrator for a debt due his intestate, may file in set-off a demand for money paid by him to defray the funeral expenses of the deceased. The same reason which makes the debt of the deceased an improper set-off to the demands of the administrator, growing out of transactions subsequent to the grant of letters, also holds good against a set-off based upon a cause of action against the

decendent acquired after his death. While it is clear that an administrator cannot, to the detriment of creditors or heirs, discharge a debt due the estate by a cancellation of his individual liability to the debtor, yet it may be allowable as an equitable set-off where only the rights of the administrator will be affected, and justice be done between the parties. Whether a claim barred by the Statute of Non-claim can be set off to an action by the administrator for a debt due the deceased, is affirmed in some, denied in other States.¹

§ 388. **Claimants as Witnesses.** — The common-law disability of parties to testify in their own behalf having been removed by legislation in England and America, it became necessary to except from the operation of the enabling statutes all cases in which one of the parties had died, become insane, or was for any reason legally disabled from testifying. The object of these exceptions is, in the language of Judge Sherwood, "to guard against false testimony by the survivor; and in order to do this [the statute] establishes a rule of mutuality by which, when the lips of one contracting party are closed by death, the lips of the other are closed by the law."² All questions arising in connection with the competency of a party to testify should, therefore, be solved in full recognition of the purpose of the enabling statute on the one hand, which is to increase the sources of light by which to discover the truth of the respective allegations, — not to diminish them by disabling any one from testifying who was competent before, — and of the object of the exception on the other, which is to avoid the injustice that might follow the admission of testimony in his own behalf of one whose adversary in the proceeding can neither contradict, correct, nor explain it if false or erroneous, nor himself testify to countervailing facts.

While the spirit of the rule is as stated above, it must be remembered that in each case there is a statute to construe, and that these statutes vary not only in phraseology, but in positive provisions.³

¹ See Woerner on Administration, § 398.

² *Williams v. Edwards*, 94 Mo. 447, 452.

³ For fuller discussion of the subject-matter of this section, see Woerner on Administration, § 398.

CHAPTER XLIII.

OF THE TIME WITHIN WHICH CLAIMS MUST BE ESTABLISHED.

§ 389. **Time of establishing Claims with Reference to their Rejection by the Administrator.** — In various States statutory provisions are made as to the time when actions for establishing creditors' claims must be brought with reference to the time of their exhibition to the personal representative. In a number of States the action must be brought within a certain time after exhibition, fixed by the respective statutes, varying from sixty days to nine months. In another set of States, on the other hand, actions are not authorized until after the expiration of a certain period, deemed necessary to give executors and administrators sufficient time to satisfy themselves of the justice of the claim, and of the solvency or insolvency of the estate, so as to enable them to avoid unnecessary litigation and expense. In many States there is no statutory provision on this subject, and the Statute of Non-claim, to be next discussed, need alone be consulted.¹

§ 390. **Special Limitation of Time to establish Claims against Estates.** — In furtherance of the policy, emphasized in the American States, of securing the earliest possible settlement of the estates of deceased persons compatible with the just rights of creditors, in addition to the preference given to diligent creditors in some of the States, special laws of limitation are enacted in most of them applicable to demands against the estates of deceased persons, known generally as statutes of non-claim, or of short or special limitation. These limitations exist independent of and collateral to the general law of limitation affecting alike the right of action against living persons and the representatives of those deceased. According to these statutes, all claims against deceased persons must not only be exhibited to their executors or administrators, but also enforced against

¹ See Woerner, § 399.

them, by institution of legal proceedings, or reduced to judgments or allowances against the estate within a certain period, varying in duration from four months to several years, in default of which they are forever barred. In some of the States discretion is vested in the probate court to extend the time within which claims may be proved beyond the period limited by the statute.

It is as much the duty of executors and administrators to insist on this defence as any other; hence it is held that they incur a personal liability to any one who may be injuriously affected thereby, if they fail to plead or invoke this special bar whenever it is applicable; the administrator cannot waive the statute. The failure of the administrator to publish the notice to creditors of his appointment, as required by statute, is generally fatal to the interposition of this plea.

The Statute of Non-claim, or Special Limitation, is not to be construed together with, or as attached to, the general Statute of Limitations, but independently. Hence generally, either of the statutes, if it has run its course, although the other has not, may be relied on as a bar. But it is otherwise in some States, where it is enacted by statute or held, that if the general Statute of Limitations has not run its course at the time of the debtor's death, the creditor may bring his action at any time within a certain period from the grant of letters, or after the debtor's death, or (as in Arkansas) at any time within the period covered by the Statute of Non-claim, although the general statute may meanwhile have completed its course.¹

§ 391. Application of the General Statute of Limitations to Executors and Administrators. — The rule requiring executors and administrators to invoke the bar of the Statute of Non-claim whenever it is applicable, is not so imperative in respect of the general Statute of Limitations, of which Lord Hardwicke said that no executor was compellable, either at law or in equity, to take advantage against a demand otherwise well founded.² This remark is relied on in several American States as a correct statement of the law, and the principle is generally recognized in the absence of statutory regulation of the subject. But in a

¹ See Woerner on Administration, § 400.

² Norton v. Frecker, 1 Atk. 524, 526.

number of States, generally by statutory provision, the executor or administrator is bound to set up the bar of limitation, and where the personal assets in the administrator's hands are insufficient to pay the debts, so that it becomes necessary to resort to the real estate for this purpose, he is not allowed, in some States, to waive the bar of the general statute, or the heirs entitled to the real estate may plead it if he does not. A distinction is also made, in some States, whether the general statute has run its course before the appointment of the administrator, in which case he is not allowed credit in his account for the payment of debts so barred, or whether it has only begun to run during the lifetime, and extends, before completing its course, to a period beyond the debtor's death. And as a general principle, it has been held in some States (though denied in others ¹) that during the interval between the debtor's death and the appointment of an administrator to his estate the general statute ought not to run; and so the time before the expiration of which, in some of the States, the bringing of an action against an executor or administrator is inhibited, ought to be added to the time prescribed by the general Statute of Limitation.

§ 392. **Application of the Statute of Non-claim.** — The Statute of Non-claim, or of limitation specially to estates of deceased persons, is in most States applied more rigorously than the general Statute of Limitation; the administrator cannot waive it, and it has been held that the temporary absence of the executor from the State does not interrupt its course. And so where an administrator dies, the time intervening before the appointment of his successor has been held not to interrupt the Statute of Non-claim, because it lies within the power of the creditor to cause the appointment of an administrator *de bonis non*, or even to serve as such himself. We have seen that in those States where suit is inhibited against the estate for a certain period after the grant of letters, such time is added to the period of general limitation, but this principle should not be applied to extend the time given by the special or non-claim statute.

¹ On the ground that the creditor may compel administration at any time. *Baker v. Brown*, 18 Ill. 91.

Whatever the effect of promises or admissions made by the personal representative to the creditor may be with regard to the running of the general Statute of Limitations,¹ they will not be permitted to avail the creditor against the special limitation, or Non-claim Statute (except of course by way of allowance of the claim in States where the personal representative has such power). It is held in some States that the fraud of the administrator in inducing a creditor not to probate his claim until it is barred by the Statute of Non-claim will not exempt such creditor from its operation.

The statute runs alike against all persons, under or over age, or whether insane, non-resident, or under other disability of whatever kind, unless it contain some saving clause, as it does with respect to non-residents in several States. In most of the States the saving clause extends to infants, persons of unsound mind, persons imprisoned, married women, persons in the military or naval service, and the representatives of a creditor dying after rejection of his claim, all of whom are allowed a certain period after the removal of their disability, or an increase of the time allowed by the statute to establish their claims. But in the absence of a saving clause in favor of the representative of a deceased creditor, there can be no allowance of a claim not presented by him before the expiration of the time limited.

It is also to be remembered that the equity jurisdiction of federal courts is independent of that conferred by the States on their own courts and can be affected only by the legislation of Congress,² so that, in a proper case, claims may be enforced there which would be barred in the State courts.

As between a *cestui que trust* and his trustee the Statute of Limitation does not usually apply; and where a trustee dies, the trust fund, if traceable in specie, constitutes no part of his estate, and is recoverable from the administrator by the successor in the trust, or person entitled to the fund, without any of the formalities prescribed for the establishment of a claim against the deceased; but when such trust fund is confused with the trustee's own property, so that its identity is lost, the

¹ See *ante*, § 369.

² See *ante*, § 154.

cestui que trust, or new trustee, as the case may be, stands in the position of a general creditor, to whom the Statute of Non-claim applies with equal rigor as against other creditors.¹

§ 393. **Effect of proving Claims after the Primary Period fixed therefor by Statute.** — The chief end of the various statutes enumerated in the preceding section — being the speedy settlement of estates in the simplest manner — is perhaps most effectually accomplished by the division of the administration into two or more periods, determining the priority of demands of creditors. This is reached in the States of Arkansas, Iowa, Kansas, Missouri, and Texas by assigning to the claims proved in the later periods an inferior class. In other States the same result is secured by fixing a certain time when the administrator is authorized to pay the debts which have been proved, or of which he has received legal notice, such payments constituting a defence against the claims of creditors appearing subsequently. In yet other States creditors may prove their demands after the expiration of the period of the Statute of Non-claim, but can have satisfaction only out of such assets as were not inventoried, or known to the administrator before, but were first discovered after such time.

It is obviously necessary that a time be fixed for the payment of debts by executors and administrators. When that time has arrived, the court must by its order determine what creditors, and how much to each one, the administrator is to pay. A compliance by the administrator with such order must be a protection to him against creditors presenting claims subsequently, no matter for what reason they had not appeared before. Hence the operation of the saving clauses incorporated in the Statutes of Limitations and of Non-claim, and the postponement of the Statute of Non-claim in cases of contingent debts are confined to property or assets not liable to creditors whose rights have become fixed by compliance with the legal requirements determining the class and the fund out of which they are to be satisfied. If such claims be proved subsequent to a distribution to heirs or legatees, they may constitute a demand enforceable against them to the extent of the assets

¹ For authorities as to the statements of this section, see Woerner on Administration, § 402.

received by them; but if they had an opportunity to prove their claims against the executor or administrator, and neglected to do so, the bar is complete, and protects heirs and legatees as well as executors and administrators.¹

¹ See on this *post*, §§ 578-581.

CHAPTER XLIV.

OF CLAIMS AGAINST ESTATES SPECIALLY ADMINISTERED AS
INSOLVENT.§ 394. **Special Administration for Insolvency in Some States.**—

In most States no distinction is made between solvent and insolvent estates; both are administered in probate court under the same law. But in fourteen States of this country the statute provides a distinct way for administering insolvent estates, apart from the general law applicable to solvent estates. This system is analogous to the insolvency and assignment law provided for living debtors.

It would seem that the modern probate system with its classification of debts, its provisions for their allowance within a certain time and for the payment *pro rata* of all of the same class, is fully equipped to meet the case of insolvency of the deceased, and renders special legislation on that head superfluous. But, on the other hand, it is true that the common-law system would be inadequate for the case of insolvency of the intestate, and that in several States where the modern system is now in force these special insolvency laws were adopted long since, when there was good reason for their enactment, and have kept their place to these days.

§ 395. **How Estates are declared Insolvent.**—The declaration of insolvency in these States is made by the court having jurisdiction of the estate, upon suggestion, application, or report of the administrator, or by creditors. The estate, as to the method of its settlement, must thereafter be treated as an insolvent estate, even though it may eventually be found in fact to be abundantly solvent, unless provision to the contrary be found in the statute. The declaration of insolvency should be made as soon as it appears that the assets of the estate are insufficient to pay its debts, which the administrator is, as a general rule, bound to know as soon as the time for presenting

claims has expired; but if he has paid claims in full before the expiration of such time, he is not thereby precluded from obtaining a declaration of insolvency. If he neglect to represent the estate insolvent, knowing it to be so if the claim presented to him be allowed, because he relied upon his defence against the validity of the claim, the judgment on such claim will make him liable for the full amount, without regard to the assets in his hands.

§ 396. **Special Administration of Insolvent Estates.** — In a few States insolvent estates are settled in chancery; but upon the declaration of insolvency, the statute requires, in most of the States distinguishing solvent from insolvent estates, the appointment of commissioners, whose office it is to receive and adjudicate upon all the claims against the insolvent estate. Commissioners appointed to pass on demands against the estates of deceased persons, although they do not constitute a "court" in the constitutional sense, act judicially, and their finding, if not appealed from or rejected by the probate court, is binding upon all parties concerned. Their allowance of a claim has, in such case, the force and effect of a judgment, so that the administrator is bound to pay the amount found by them to be due, although the claim be fraudulent and fictitious.

Provision is generally made for an appeal from the decision of the Commissioners, and for a trial *de novo*. The commissioners are to report their doings to the probate court, which may hear exceptions to the report, made either by the administrator or by the creditors, and approve or reject the same. It is the approval by the court which gives the decision of the commissioners its quality as a judgment, but it has been decided in several States that the probate court has no power to pass upon the validity of claims in insolvent estates, and that in passing upon the report of the commissioners its discretion extends no further than to determine whether the report presented is the judgment of the commissioners; there may therefore be an appeal from the approval or rejection of the entire report, as well as from the decision of the commissioners on any particular claim, which causes of appeal must not be confounded with each other, as they present different issues for trial in the appellate court.

The jurisdiction of commissioners of insolvent estates in passing upon the claims presented against them is very much like that of probate courts in passing upon claims generally, and they are governed by the same rules of evidence.

§ 397. **Time within which Claims must be presented against Insolvent Estates.** — In most of the States providing for special administration of insolvent estates, the time limited for the presentation of claims to the administrator, court, or commissioners of insolvent estates is shorter than the limitation for proving claims against solvent estates. Saving clauses are found in some of the States in favor of persons under disability; and in most of them the court may, for good reason shown, extend the time for a period, the maximum of which is also fixed by statute.¹

¹ The subject of this chapter will be found treated in detail in Woerner on Administration, §§ 404-407.

CHAPTER XLV.

OF CLAIMS SECURED BY COLLATERAL.

§ 398. **Rights of Creditors holding Collateral Security to Assets of Insolvent Estates.** — There are two views as to the amount which a creditor who has collateral or security of any kind for his claims can prove up against an insolvent estate.

Under the equity rule the practice is to allow the creditor to prove his whole debt, without regard to any collateral security he may hold. If the dividend so reduces the debt that the collateral security will more than pay it, the personal representative is bound to redeem for the benefit of the general creditors."¹ The effect of this rule gives to the creditor the advantage of a dividend on the full amount of his claim, in addition to the value of any collateral security he may hold, and throws the burden of redeeming the same upon the executor or administrator in case both of these funds exceed the amount of the debt. It has been followed in America in a number of States.

Under what is known as the Bankruptcy Rule the creditor is allowed to prove against the general assets only for the difference between the amount of the debt and the value of the security he holds. This view seems to be gaining ground in the United States, as being consonant with principles of justice, and putting the specialty creditors and the general creditors on an equal footing. The subject is regulated by statute in a number of States.²

It is held that a *bona fide* lien, though not recorded, has priority over the claims of general creditors to the specific property covered by it.³

§ 399. **Actions to foreclose Collateral Securities.** — Actions to foreclose mortgages, or to enforce other collateral securities or

¹ 1 Story's Eq., § 564 b.

² See Woerner on Administration, § 408.

³ Dulaney v. Willis, 95 Va. 606.

liens, are distinct from the allowance of the debts so secured; and since, generally, probate courts have no jurisdiction of such actions, the limitations and conditions imposed on the parties enforcing the payment of simple debts against executors or administrators are not applicable.

The lien may generally be enforced without any action looking to allowance of the claim against the general assets. Though the Statute of Non-claim has barred the allowance of the claim against the estate, the lien may be enforced, if not itself barred by the general statute.¹ On the other hand, probating the claim does not affect the holder's right to foreclosure. For the same reason, the right to foreclose gives the holder no remedy against the general assets of the estate, and does not give such a claim a preference thereto, and his claim in this respect for any deficiency is barred like any other claim, unless he presents the same in proper time.

It is also to be observed that in most States proceedings to enforce liens or foreclose on collateral securities are suspended by statute for a certain period after the debtor's death, generally six, nine, or twelve months; to an action for the foreclosure before the expiration of such time, a demurrer is proper and should be sustained.

¹ Cowan v. Mueller, 176 Mo. 192.

CHAPTER XLV A.

OF THE PAYMENT OF DEBTS WHEN ESTABLISHED.

§ 400. **Nature and Effect of the Allowance or Judgment establishing Claims.** — It should result from the foregoing discussion of the subject under consideration, that all of the provisions requiring notice to be given to creditors — the exhibition of claims to the executor or administrator, allowance or rejection of the claims either by the personal representative or tribunal provided for that purpose, and the judgments rendered thereon either by probate courts or courts of plenary jurisdiction — accomplish the one purpose of determining authoritatively the liability of the deceased debtor to his creditors. The satisfaction to which the creditors are entitled out of the estate in the hands of the executor or administrator is not thereby adjudicated, but is determined by a subsequent proceeding, usually taking the form of an order or decree to pay debts. This feature constitutes the crowning advantage of the American system of administration over that of the common law, operating so as to simplify greatly the duties of executors and administrators in the matter of paying debts and marshalling the assets for that purpose, and reducing the hazard inseparable from the common-law procedure in a corresponding degree.

The determination of the liability of the deceased debtor to his creditor, even where it takes the shape of an allowance or judgment by a court, is not generally enforceable by execution against the decedent's estate or the personal representative, but must be certified to or filed in the probate court for classification, resembling, in this respect, the judgment *de bonis intestatis*, or *de bonis testatoris*, at common law, but in no manner involving any question of assets, which is determinable in the probate court by an independent proceeding. Jurisdiction to order the payment of claims established, after ascertaining the amount of assets in the hands of the administrator, and mar-

shalling them according to the dignity of the debts established, is vested in the probate courts in almost all States.

In some States the statutes provide that execution may issue on judgments recovered, notwithstanding the debtor's death; but the construction given them by the courts tends to limit the effect to be given these statutes, as being opposed to the spirit of the administration law.

Where the judgment rendered in the lifetime of the deceased constituted a lien on specific property (as it does with reference to realty under the Statutes of many States) such lien can be enforced, in some States, without resort to probate court, as in the case of liens generally, heretofore mentioned.

§ 401. **The Order or Decree to pay Debts.** — When the time for proving or exhibiting debts has expired, or when, in those States in which classification is determined by the time of presentation, the time for proving the preferred class has expired, it is the duty of the executor or administrator to lay before the court a complete statement of the condition of the estate, showing what assets are in his hands, and what funds immediately available for the payment of debts; also the amount of debts proved against the estate, or admitted; what claims, if any, have been presented and not allowed, or which may be in suit and remain undetermined; and all other matters necessary to enable the court to ascertain the solvency or insolvency of the estate, and determine the amount of the dividend if insolvent. The court will thereupon decree the payment of the debts which have been proved, in the order of the classes to which they were assigned, each class to be paid in full before the next inferior class receives anything; and when the assets are sufficient to pay a part, but not the whole, of the debts of any one class, the creditors of that class will be payable *pro rata*.

The order or decree of payment so made corresponds, in some measure, to the judgment *de bonis propriis* at common law; because, having ascertained the amount of assets in the administrator's hands available for the payment of debts, and also the amount to which each creditor is entitled, the court, by its order or decree, renders judgment against the administrator, making him liable personally to the creditor for the specified amount, which is enforceable by execution against him, and

by suit on the bond of his sureties, and subjecting him thereafter, in most States, to garnishment by a creditor of the creditor whom he is ordered to pay.

§ 402. **Enforcement of the Order or Decree to pay Debts.** — It follows from the nature of the order, as already pointed out, that the decree to pay debts, involving a judicial determination of the question of liability of the estate to the creditor, and of the further question that the executor or administrator is in possession of assets to discharge the same, must be enforceable against the executor or administrator, either by execution against him, or by action against him and the sureties on his bond. Cumulative summary remedies are given the creditor by the Statutes of some States, such as a proceeding by *scire facias* in the probate court against the sureties on the bond after a return of *nulla bona* against the personal representative, in addition to the ordinary suit on the bond in another court. In a proceeding on the administrator's bond, the order or decree of the court is usually binding upon the sureties, who are not permitted to make any defence against the same which the administrator might have made; but this is held otherwise in some of the States.

TITLE SIX.

OF LEGACIES AND DEVICES.

§ 403. **Distinction between Devises and Legacies.** — Next after the payment of debts, the most important function of executors and administrators *cum testamento annexo*, consists in giving effect to the disposition made by testators concerning their property. These dispositions are, in technical language, known as devises, and the persons in whose favor they are made as devisees, if the subject of the gifts is real estate; while the gift of personal property by will is called a legacy or bequest, and the donee thereof is known as a legatee, or legatary. But in construing wills an incorrect use of these terms will be disregarded to meet the testator's intention.

PART I.**OF ASCERTAINING THE MEANING OF WILLS.****CHAPTER XLVI.****OF THE GENERAL RULES APPLIED IN EXPOUNDING WILLS.**

§ 404. **Ascertaining the Testator's Intention.** — A last will or testament is the expression, in such form as may be prescribed by law, of the testator's intention, in respect of his property, to be carried into effect after his death. Hence to ascertain this intention is the first duty of executors and courts whose office it is to carry the will into effect. If its provisions are clearly apparent, no recourse to technical rules is necessary, nor, indeed, permissible, to establish its contents. The testator's intention must be gathered from the language employed in the instrument, and from that alone. An eminent authority on testamentary law declares that "the question in expounding a will is not what the testator meant, but what is the meaning of his words."¹ It is therefore a cardinal principle in expounding wills, that the intention of the testator must be found in his expressed words. The grammatical and ordinary popular sense of the words should be adhered to, unless it would lead to some absurdity, or repugnance, or inconsistency with the rest of the instrument. If, in so considering the language of the testator, an intelligible intention may be elicited therefrom, neither technical informality, nor grammatical or orthographical errors, nor confusion in the arrangement of words arising from unskilfulness, can be permitted to defeat it. Of course, the words which the testator employed should be taken in the sense in which he understood them; hence, although technical words

¹ Williams Executors [1078].

are not necessary to give effect to a testamentary disposition, and will, if used, be controlled by the plain intent of the testator, yet his words and phrases are to be taken, *prima facie*, in their technical sense, and receive that construction which a long series of decisions has attached to them, unless it is clear that they were used in a different sense.

The ambiguity of human speech, however, is such as to make it necessary, in many cases, to resort to rules of interpretation, or of construction, to discover the meaning of written instruments; and in no class of instruments does this necessity occur so often as in that of wills, the language of which has been exempted from all technical restraint.

The adoption of rules by which particular words and expressions, standing unexplained, have obtained a definite meaning, and the maturity which the system of construction has attained, has led to the satisfactory result of considerable certainty in the expounding of wills.

§ 405. Rule requiring the Several Parts of a Will to be construed together. — It is highly important to bear in mind that the entire will must be construed together, its several parts with reference to each other, so as to form, if possible, one consistent whole, giving effect to every part of the instrument, including the codicil or codicils, if there be any.

But as between two absolutely conflicting provisions the latter prevails. This rule, however, is only invoked as a last resort where it is impossible to make apparently conflicting provisions consistent under any other rule of construction. This may be illustrated by the case of the devise of the same land in different clauses of the will to different persons in fee. Some courts find here a case of irreconcilable repugnancy, and, under the second rule above stated, give the land to the devisee in the later clause; other decisions, making the whole will effective under the rule first stated, give the land to the devisees in both clauses as tenants in common.¹ Where the will admits of two constructions, that is to be preferred which will render it valid; and if the whole will cannot be carried into effect, it is not to be rejected for that reason, but it is to work as far as it can.

¹ *Day v. Wallace*, 144 Ill. 256, citing authorities *pro* and *con*.

So the apparent injustice, or the inconvenience or absurdity of a devise, if unambiguous, affords no ground for varying the construction; nor the fact that the testator did not foresee the consequences of his disposition; nor can an express, positive devise be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will, or by irrelevant or inaccurate recitals; yet recourse may be had to such references, reasons, etc., to assist in construction in case of ambiguity or doubt.

The holdings are not wholly in accord as to whether revoked or void clauses can be examined with the view of discovering the testator's intention.

§ 406. **General Intent controlling the Particular Intent.** — It is a familiar and very important rule, also, that the general intention is to control the particular intention, if there be an irreconcilable inconsistency between them. Where, for instance, the will directs a purpose to be accomplished, and also points out the means by which the result is to be reached, which means turn out to be inadequate to accomplish the end, so that the provisions cannot both be carried into effect, it is evident that the directions pointing out the means must be sacrificed to the accomplishment of the end, if the end can be accomplished by other means; for otherwise the testator's intention is entirely defeated. Thus, where rents and profits of real estate are devised for the support of some person, and prove insufficient for such support, the devise of the rents and profits will be construed as a direction to sell or mortgage the real estate, in order to obtain the end intended by the testator.¹ And courts will in some cases enlarge, in others cut down the estate, in order to carry out the leading and prominent objects of the testator, as indicated by a view of the entire will and all its various provisions.

§ 407. **Construction of Terms repeated in the Will.** — The general rule requiring the same words occurring in different parts of an instrument to be taken everywhere in the same sense, unless clearly contrary to the testator's intention, does not apply when the same words refer to different subject-matters. Thus, if a word having a technical meaning in the law is accom-

¹ Haydel v. Hurek, 72 Mo. 253.

panied in one clause by context showing that the testator meant it to be understood in a different sense, while in another clause it is used in reference to a different subject without explanatory context, it is to receive in the latter clause its technical meaning. So the same word may, even if used but once, be differently construed in reference to different subjects of gift; where, for instance, real and personal estate are given to one, and if he should die *leaving no issue* of his body, then to another, the words "leaving no issue," when construed as to the personal estate, mean leaving no issue at the time of his death, but as to the freehold they mean at least under the old rule an indefinite failure of issue.

The correlative rule that when a testator uses in one place words different from or additional to those used in another, a different or additional meaning must be sought, is of slight practical value, though logically sound enough. A testator is prone to vary phrases without intending to vary meaning. His intent must be sought in the whole instrument.

§ 408. **Rule allowing Words and Limitations to be transposed, supplied, or rejected.** — If it is impossible to give a rational construction to the words of a will as they stand, words and limitations may be transposed, supplied, rejected, or changed. So with regard to punctuation. It is evident, however, that resort to this rule can only be had in very clear cases, in which the context leaves no room for reasonable doubt as to the testator's intention. If this cannot be ascertained from the will itself, the bequest or devise must fail, for any alteration of the testator's language would but substitute for his will one made by the expounder. There are cases in which there has been direct substitution of one word for another.¹

§ 409. **Precatory Words.** — The testator may devise or bequeath his property with trusts as to the whole or any part of what is thus disposed of. When the testamentary disposition of the title is accompanied by expressions requesting or desiring the legatee or devisee to do certain things with the property thus received, for the benefit of others, the question constantly arises whether, on the one hand, a trust has been imposed on

¹ *Baird v. Boucher*, 60 Miss. 326; *State v. Joyce*, 48 Ind. 310. And frequently the word "and" is substituted for "or."

the property which the law will enforce, or whether, on the other hand, the gift is absolute in law, leaving the request or desire as a mere moral obligation with which courts have nothing to do. "The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not, at his discretion."¹

English Equity (following Roman law) was inclined to adopt rules of interpretation on the subject, according to which words in a will expressive of desire, recommendation, and confidence are of technical significance, importing a trust.

But this ancient learning, with its intricate technical distinctions, is largely inapplicable to modern conditions and is therefore modified in the law of to-day. It is now only a matter of intention. In the words of Justice Matthews of the United States Supreme Court: "If it appear to be the intention of the parties, from the whole instrument creating it [the trust], that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will carry with it the whole beneficial interest, and when it will be construed to create a trust, but the intention is to be gathered in each case from the general purpose and scope of the instrument."²

§ 410. **Estates by Implication.** — Courts uphold bequests and devises by implication whenever the intention of the testator is free from doubt though no direct gift be made in the will. If there be an erroneous recital that there is a gift contained in the will, the recital may operate as being in itself a gift by implication of that very property; but when the erroneous recital refers to an estate created by another instrument, that recital cannot operate to create an estate by implication.³ A common

¹ Per Vice-Chancellor Cranworth in *Williams v. Williams*, 1 Sim. (N. S.) 358, 367.

² *Colton v. Colton*, 127 U. S. 300, 310.

³ *Hunt v. Evans*, 134 Ill. 496, 502.

illustration is a devise to the testator's heir after the death of A, no other disposition being made of the property. The testator has expressly excluded the heir during A's life, and thus shown that the property is not to go as intestate during A's life. The only possible conclusion is that the testator intended A to have the property during his life, though it is not so said in express terms.

In applying the foregoing rule, the limiting principle of law must not be forgotten, that no words in a will ought to be so construed as to defeat the title of the heirs at law, if they can have any other significance. If, therefore, referring to the last illustration above, the land is devised after A's death to B, a stranger, and not the testator's heir, the heir has not been necessarily excluded, as in the first case given. The testator is considered intestate as to that land during A's life. A takes nothing; and the heir, as heir, has an estate *pur autre vie* while A lives.

§ 411. **From what Period the Will speaks in Respect of the Law governing it.**—The will, being ambulatory during the lifetime of the testator, cannot take effect before his death. It is therefore said to speak from the testator's death. From this it would seem to follow that its provisions must be construed with reference to the law in force at the time of the death of the testator; and such is now almost universally recognized to be the rule. The objection that no statute can or ought to have retrospective effect is clearly inapplicable to the construction of a will drawn and executed before the enactment of a statute bearing upon its provisions, but taking effect by the death of the testator after it is in force.

The will disposes of the personalty of the testator at the time of his death, but under a technical rule of the common law no real estate could pass by a will of which the testator was not the owner at the time of its execution. This rule has been severely criticised, as calculated to mislead and defeat the intention of testators, and is now abolished by statute in England, as well as in most, if not all of the States of the Union, providing, substantially, that wills shall be construed, in respect of both real and personal estate, as if executed immediately before the testator's death, or directing real estate acquired by

the testator after the date of the will to pass thereby, if such appear to have been intended.¹

§ 412. **From what Period the Will speaks in Respect of the Testator's Intention.** — It is plain enough that, when a testator speaks of a condition of things as actually existing, he refers to the period of writing, or executing, the will. Hence, the word "now," or any expression pointing to present time, must be understood as referring to the date of the will. A gift for life to A, and after his death to his widow, was held to apply to the wife of A living at the date of the will, and not to any wife who might survive him.² A gift to "my wife" will, where such appears to be the testator's intention, refer to the woman whom he had long lived with and held out to be his wife, instead of his lawful wife whom he long ago deserted in a foreign country.³ And a gift to the testator's child named, if living at the date of the will, would not, if such child should die, go to another child subsequently born to him, of the same name.⁴

The above illustrations sufficiently indicate the circumstances under which the language of a testator must be understood as referring to the condition of things existing at the time of writing the will.

That a testator *can* at this day dispose by will of real property acquired after making it, is shown in the preceding section. This still leaves the question for construction whether in a given case he has actually done so. Unless its language by fair construction indicates otherwise, the testamentary disposition carries all the property owned by the testator at the time of death.

Of course, the end aimed at in expounding a will in which questions as to after-acquired property arise, is the same as in expounding any other will, — to ascertain the intention of the testator; hence, words which are universal in their scope, such as "my whole estate," etc., will carry after-acquired property without particular mention of the period of the testator's death; but where the language is not so comprehensive, other

¹ These statutes, with peculiarities in a few States, are discussed in Woerner on Administration, § 419.

² *Anschuetz v. Miller*, 81 Pa. St. 212, 215.

³ *Pastine v. Bonini*, 166 Mass. 85.

⁴ *Foster v. Cook*, 3 Bro. C. C. 346.

words in the will are necessary to indicate such intention, or the after-acquired property will go as if the testator had died intestate. And although the words considered by themselves be comprehensive enough to carry any estate owned by the testator at the time of his death, yet a contrary intention may be inferred from the context, and will be enforced.

§ 413. **Extrinsic Evidence in Aid of Construction.** — Extrinsic evidence will sometimes be received to aid in the interpretation of a will. Courts are obliged to give effect to every intention which the will, properly expounded, expresses; it follows that evidence which in its nature and effect is simply explanatory of *what the testator has written* may be admitted, while none is admissible which, in its nature or effect, is applicable to the purpose of showing merely *what he intended to have written*.

“That the court may put itself in the place of the testator by looking into the state of his property and the circumstances by which he was surrounded when he made his will, is not only true as a general proposition, but without such information it must often happen that the will could not be sensibly construed.”¹

If the language of the will, construed in the strict and primary sense of the words, not shown by the context to have been used in any different sense, is void of meaning or insensible with reference to extrinsic circumstances, courts will admit extrinsic evidence to see whether the words be applicable to such circumstances in any popular or secondary sense of which they may be capable. Thus it may be shown that a person or corporation was known to the testator by a name different from his or its ordinary or corporate name, in order to show identity with one named in the will; or that a legatee was misnamed by the testator. But extrinsic evidence is not admissible to supply a clause or word omitted by the testator, or by the scrivener, nor to show that an erroneous word was written in the will by mistake not apparent on its face; nor to control the meaning of language neither ambiguous nor inconsistent with extraneous facts; nor to vary the terms of a will which can be carried into effect as they stand.

It is generally said that the introduction of parol testimony is

¹ *Wilkins v. Allen*, 18 How. (U. S.) 385, 393.

excluded in the case of a patent ambiguity. A patent ambiguity is one appearing on the face of the will. A bequest in numerals may leave it doubtful whether five dollars or five hundred dollars are given. A latent ambiguity is one which appears only by extrinsic facts. A bequest to "my nephew John," when it appears outside the will that the testator had two nephews of that name raises a latent ambiguity. This rule against receiving evidence in case of patent ambiguities, it has been said, "is very generally stated too broadly, — frequently for the reason that, with reference to the case before the court, the rule, however broadly stated, is correct in its application. But it is not true that an ambiguity appearing on the face of the paper, if that alone be looked to, cannot be explained by parol."¹ There is a rule against introducing the testator's declarations, to be discussed later in this section, which includes cases of patent ambiguity, and is indeed chiefly directed against them. It is also clear that no patent ambiguity will justify evidence tending to give the will a meaning which the document will not bear on its face. It is believed that all well-considered decisions relied on to sustain the rule that parol evidence is not received to explain a patent ambiguity fall within one or the other of the classes just mentioned.

Where there is misdescription of person or property in a will, the maxim *falsa demonstratio non nocet* permits the rejection of part of the description, provided what remains is sufficient. Here ambiguities may arise. A devise of "lot 1" of a certain block, followed by a description by metes and bounds which covers lot 2, presents such a case. All authorities agree in receiving oral evidence (except declaration) of the testators to show which property was intended. After rejecting the erroneous part, a sufficient description must remain in the will.

The exception to the rule stated at the beginning of this section is, that declarations of the testator will not be received to ascertain the meaning of the will. Such evidence of declarations of the deceased, coming after his death, is apt to be vague, biased, if not worse, and not readily capable of contradiction. Its introduction would tend to unsettle the construction of wills.

¹ Schlottman v. Hoffmann, 73 Miss. 188, 202.

But to this exception there is in turn an exception. When the will contains a latent ambiguity, as in the case of the bequest to "my nephew John," when there are two nephews of the name, declarations of the testator *are* received to settle the ambiguity. But in case of patent ambiguity the testator's declarations are *not* received.

The admissibility of a testator's declarations on the interpretation of the will must be distinguished from their admissibility when the issue concerns the validity of the will when fraud, undue influence, or the like are charged in a proceeding for probating the will. That subject is treated *ante*, § 207.

§ 414. **Testamentary Donees as Classes.** — In this section and the following one the interpretations which courts have fixed on certain terms of frequent use in wills are given. Such settled constructions aid much in making the interpretation of wills certain. But it must be remembered that in all cases save the few where the construction given is a rule of law and not of interpretation (as for instance the common-law holding as to the rule in Shelley's case), these constructions are merely in aid of the all-important object of arriving at the testator's expressed intention. The rulings apply, therefore, to the terms standing by themselves, and may easily be set aside by the context.

A legacy given to a class immediately vests absolutely in the persons composing that class at the death of the testator, unless the testator intended to refer to a class as existing at the date of the will. Hence, as a general rule, a gift to "children" as a class, immediately, intends those, and those only, who answer this description at the death of the testator, including children *en ventre sa mère*; but if from the language of the will it clearly appear that the testator intended those only who answered this description at the date of the will, then the gift must be confined to them. So a gift to a class which is postponed to the expiration of an intervening period after the testator's death must be shared by all who constitute the class at the expiration of the intervening estate, including children born after the testator's death; the heirs of such as may have died after the vesting of the gift are entitled to take in their place. Children

born after the period fixed for the distribution have no claim, although the gift be to children "born or *to be* born."

The word "children" properly includes only the immediate descendants of the person named, and does not therefore usually apply to grandchildren or issue generally. But if the word "children" can have no operation, or where it is clear that the testator uses the words "children" and "issue" indiscriminately, and that he means *issue* when he says *children*, it will be construed according to his intention, as meaning or including grandchildren. When it was shown that the testator who willed property to "children," had none, but only grandchildren, the property was given the latter.¹

It may be mentioned here, that, according to the doctrine usually called "the rule in Wild's Case,"² on a devise to a man *and his children*, if he have none at the time of the devise, the word "children" must be taken as a word of limitation, so that he takes an estate tail; but if he has children living at the time of the devise, "children" must be taken as a word of purchase and they take jointly with him. The rule, which has been followed as the law of England ever since, can, from the nature of its feudal origin, apply only to real estate; in respect of personal property, an absolute interest will pass where an estate in tail would be created in real property.

The word "children" used in a will does not include illegitimate children or step-children, unless such appears to be the testator's intention.

"Grandchildren" *prima facie* excludes remoter degrees, and also grandchildren by marriage, *i. e.*, the grandchildren of the testator's spouse. "Nephews" and "nieces" are construed on the same basis, as also "cousins," etc.

§ 415. **Classes designated by Technical Terms.** — By the doctrine embodied in what is known as the rule in Shelley's Case, when a freehold is given to one, and by the same instrument a limitation, either expressly or impliedly, to his heirs, or the heirs of his body, the estate vests wholly in the first taker, — if limited to the heirs of his body, a fee tail; if to his heirs, a fee simple.

¹ In the will of Scholl, 100 Wis. 650.

² Wild's Case, Co., pt. 6 * 17.

The rule has been abolished in almost all the States of this country, and in most of them it is supplanted by the statutory provision, that a devise, and in some of them also a bequest, of property to any person for life, and after his death to his heirs, heirs of his body, or the like, shall vest an estate for life in the former, with remainder in fee simple to the latter.

This rule at common law has nothing to do with the testator's intention. "It is a rule of property and overrides the intention. In fact, wherever applicable, it may be said that it disregards the intention altogether."¹ In this country, however, it is now, when applied at all, generally regarded as a rule of construction, not a rule of law, and will therefore always give way to the clearly ascertained intention of the testator, although such is not universally the case; in a few of the States it is held to be a rule of law. It is also to be remembered, that, as to personal property bequeathed, it vests absolutely in the first taker, and consequently goes to his executor or administrator, whether he has issue or not, by words which would create an estate tail in real property.

Thus, a legacy to A and his heirs, or to A and the heirs of his body, or a legacy in any equivalent expression, is an absolute legacy to A, and this although the gift be through an intervening trustee; unless it be clear from the context that the testator used these words with the intention of conferring a gift upon the "heirs," etc., treating them, for instance, as synonymous with children, in which case they take as purchasers.

Where the words "heirs," "legal heirs," etc., are used in a will, not to denote substitution or succession, but as designating legatees, they will be construed in their primary legal sense, unless it appear from the context that the testator used them in a different sense. Hence, gifts to heirs, whether of the testator or of others, when unexplained and uncontrolled by the context, are gifts to the persons appointed by law to succeed to the property of a deceased person in case of intestacy.

The word "issue" — popularly expressing progeny, children, offspring — is equivalent in its technical significance to "descendants," comprehending every degree, unless restrained by the context.

¹ *Travers v. Wallace*, 93 Md. 512.

When there is a devise to several persons belonging to different classes, of different degrees of relationship to testator, and the will leaves in doubt the testator's intention, distribution will be made *per stirpes*; but where there is but one class, the division should be made *per capita*.

The term "descendants" comprises every individual proceeding from the stock or family referred to, and does not, without very clear indications of the testator's intent by the context, include collateral heirs, or heirs generally, or next of kin, but only the issue of the body of the person named. A devise or legacy to descendants, not otherwise qualified, is distributable between them *per capita*; but the ascertained intention of the testator will govern in this respect also.

A gift to "relations," without a particular specification, is necessarily construed as a gift to those who would take the estate in case of intestacy, because in its widest sense it would include every degree of consanguinity, and thus render the gift void for uncertainty. "Nearest relations" will exclude nephews and nieces when there are surviving brothers and sisters, and applies properly only to those who are of kin by blood; hence, relations by marriage are not included in a bequest to "relations" generally. But a gift to be divided between testator's relations and those of his wife goes one-half to the relatives of each.

A devise or bequest to "next of kin" goes to the nearest blood relations in equal degree of the person mentioned, without reference to the Statute of Distribution. Hence, nephews and nieces take under such a gift, to the exclusion of the representatives of deceased nephews and nieces, and a surviving brother in exclusion of the children of a deceased brother or sister. Where, however, the testator gives to his next of kin in classes, and leaves the proportions doubtful, the several classes will take according to the Statute of Distribution. Without reference to anything in the context, the word "family" will be usually held to comprise the same persons as next of kin or relations in respect of personalty, and heirs in respect of realty. It may or may not refer to the husband or wife, as found to be the testator's intention.

The term "legal representatives," or "personal representa-

tives," applies strictly to executors and administrators; but as it is improbable that gifts to them should be intended for their own benefit, these words have sometimes been construed as meaning the *next of kin*, — a kind of "representative" in the sense of the Statute of Distribution; particularly when it is evident that substitution was contemplated. But if there is nothing in the context of the will to show that the words "legal representatives" are to have any other than their ordinary meaning, they are to be understood as meaning executors and administrators.

So a gift to one as "executor" is presumed to be given to him in his character as executor, and hence fails if he do not become such; his qualification as executor is construed as a condition precedent, implied if not expressed, unless a different intention may be inferred from the nature of the legacy or other circumstances arising in the will.

CHAPTER XLVII.

TESTAMENTARY DISPOSITIONS CONTROLLED BY PUBLIC POLICY.

§ 416. **Gifts for Immoral or Superstitious Purposes.** — It is obvious that, if the language of a will, read with the view of ascertaining the testator's intention, is ambiguous or unintelligible, and neither the ordinary rules of construction nor extrinsic evidence where such is applicable are sufficient to enable the expounder to deduce a rational meaning therefrom, the will is to that extent simply void; for if the testator cannot be understood, it is the same as if he had not spoken. The same result necessarily follows where the testator undertakes to do what the law prohibits: a devise or legacy in contravention of law is void. Hence, a gift in furtherance of any illegal purpose is void.

In England statutes were passed under Henry VIII and Edward VI which declared gifts for superstitious purposes void. These originally included purposes not consonant with the doctrines of the Established Church. Masses for souls of the dead fell under the ban of the statutes.

In the United States, however, the absence of church establishments and of all religious distinctions and prohibitions has almost obliterated the legal cognizance of superstitious uses. "It is neither for the legislature nor the judiciary, in this State, to discriminate and say what is a pious and what a superstitious use. To do so would necessarily infringe upon the great constitutional guaranty of a perfect freedom and equality in all religions."¹ Text-writers and courts incline, generally, to the view that in the United States there can be no such thing as a "superstitious use," in the sense of the English statute. In Pennsylvania, however, on the ground that Christianity in a broad sense is still part of the common law, the court refused

¹ *Gass v. Wilhite*, 2 Dana 170, 176.

to enforce a gift to an "Infidel Society," the object of which was the promotion of atheism and infidelity.¹

Bequests for masses for the dead are never avoided in this country on the ground that they are for superstitious uses. The legal difficulties in connection with their recognition are discussed a few sections further on.

§ 417. **Gifts prohibited by the Statute of Mortmain.** — The practice of absorbing lands in the hands of ecclesiastics in perpetuity, thereby withdrawing them from public and feudal charges, led to a limitation of the rights of corporations, sole and aggregate, taking away their common-law capacity of acquiring and holding lands without the king's license, by a series of statutes known as statutes of mortmain. These, applying only to real property, were originally levelled at the religious houses, as they were introduced during the establishment and grandeur of the Roman Church; but the later acts included lay corporations as well, and made lands conveyed to any third person for the use of a corporation liable to forfeiture, in like manner as if conveyed directly in mortmain.

These acts are not recognized in this country as part of the common law.

The act popularly known as the Statute of Mortmain, more accurately the "Charitable Uses Act,"² prohibits the gift, conveyance, or settlement to or upon any person or body corporate of real property, or of personal property to be laid out in the purchase of real property, in trust or for the benefit of any charitable uses whatever, except by deed executed with certain formalities and enrolled a certain time before the donor's death.

This act is in support of a public policy not connected with that of ancient mortmain laws just mentioned. It does not attempt to restrain accumulations by corporations, but seeks to protect the normal beneficiaries of the dying man from his improvident charitable gifts. The statutes of many States in this country pursue the same object in various ways.

In some States there is a restriction as to the fractional part of the estate which can be left for charitable purposes, depend-

¹ *Zeisweiss v. James*, 63 Pa. St. 463, 471.

² 9 Geo. II, ch. 36.

ent in some States upon the nearness of the relationship of the natural claimants, the distributees. In other States the creation of valid charities must be by document executed at least a certain time, prescribed by statute, before the donor's death. These and other limitations on the power to dispose of property for charity must be studied in the respective statutes.¹

§ 418. **Corporations as Testamentary Donees.** — It is self-evident that any person, whether natural or corporate, competent to hold property, may be a legatee or devisee under a will, unless expressly prohibited by law. Such an express prohibition to "bodies politic and corporate" is contained in the explanatory statute to the original act authorizing the devise of lands in England; hence devises to corporations, whether aggregate or sole, either beneficially to them or in trust, were held void, and the devised lands descended to the heirs. The late Statute of Wills omits this prohibition to corporations *to take* land by devise; hence they are now, in England, as capable of taking as natural persons. But their disability *to hold*, arising under different statutes, is not thereby removed, and their capability to hold lands now depends upon a license from the crown, according to a statute enacted to protect against forfeiture under the mortmain acts.

Such is not the law in the United States, where none of these acts are in force. The powers of a corporation here are fixed by its charter and the law underlying it. In the absence of express statutory enactment, it is believed that the right of a corporation to take under a will is not to be distinguished from its right of acquisition by other means.

But provision is made by statute, in most States, regulating the capacity of corporations to hold property, especially real estate, and the extent to which they may take property as testamentary beneficiaries, particularly for charitable, eleemosynary, or religious purposes.

So it may be stated that the value or amount of real estate which a religious corporation may own is restricted in many States. It is held in New York, on a careful examination of the question, that a devise or bequest to a corporation of property which exceeds the amount or value which the corporation is

¹ For further details, see Woerner on Administration, § 425.

permitted to take, will be void for the excess; and the heirs or next of kin can raise the question. The same doctrine is maintained in some other States; but the contrary view is announced in other jurisdictions, holding that only the State in a direct proceeding can raise the question of the validity of the gift.

In New York the statute provides that "no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise." A devise to a foreign corporation of lands in that State is void, although the corporation was authorized by its charter to take by devise; but a bequest of personalty to such a corporation will be enforced, if, by the law of its creation, it has authority to acquire property by devise or bequest.¹

§ 419. **Corporations as Donees in Trust.** — No corporation can be seised of lands in trust for any purpose foreign to its institution, though it may take as trustee if the object of the trust be consistent with the purposes of the corporation. The application of this test occasions most difficulty when the corporation is a municipal or purely governmental body. It is clear that no purely private trust can fall within the purview of the purposes of such a corporation. Judicial opinions may differ as to what falls within the scope of the purposes of a corporation. Such was the case under the Mullanphy will, devising realty in Missouri and New York to the City of St. Louis to aid poor emigrants to the West passing through St. Louis. The city was held competent to take in Missouri,² while the contrary result was reached in New York.³

§ 420. **Rule against Perpetuities.** — Under the Statute of Uses and under the Statute of Wills it became possible to tie up the title to land almost indefinitely: a result which was not possible under the technical rules of the common law as it stood before passage of these statutes. The grave situation was met by what was virtually judicial legislation. The rule, as finally formulated by the judgment of the House of Lords, fixes the utmost period within which an executory devise may take effect to be a life or lives in being and twenty-one years thereafter,

¹ See for fuller treatment, Woerner on Administration, § 426.

² *Chambers v. City of St. Louis*, 29 Mo. 543, 572.

³ *Boyce v. City of St. Louis*, 29 Barb. 650, 654.

together with the period of gestation actually existing; a child *en ventre sa mère* being considered as a life in being. The rule applies to estates under the Statute of Uses (springing and shifting uses) as well as to those under the Statute of Wills (executory devises).

The application of the rule must be tested by possibilities at the date when the will goes into effect (the testator's death) and not by subsequent actual events. If circumstances can be conceived as of that date under which the estate would not vest within the time fixed by the rule, the limitation over is bad.

According to this rule, a gift to unborn persons postponed for a fixed term exceeding twenty-one years is void, although not preceded by a life; for a fixed term of years, however short, cannot be resorted to instead of the life or lives allowed by the rule.

If the limitation over is to a class as to some members of which it might possibly not vest until after the prescribed period, it is void as to all, if the shares cannot be defined or separated, as they cannot be when all who are intended to take must be considered in estimating them.¹ But this case must be distinguished from a devise in which the gift is to the individual, though class terms are used in the designation. A devise of ten acres to each of the testator's nephews, now living or hereafter born, for life, with limitation over on the death of each such nephew to his children in fee, would be good as to the children of nephews living at the testator's death, and bad as to the children of such nephews as were born subsequently.

The rule requires the *vesting of title* within the prescribed time; it is not concerned with the period when *enjoyment by possession* may begin. Thus a gift "to my son (and his wife, if he should marry) and after their decease to their children" is valid as to the children; for their title vests on the death of their father, the son of the testator.² It is easy to imagine a case where the children of the testator's son would not enter on enjoyment of their property till long after the period fixed by the rule. But this in no wise affects their right.

In a devise to A, and on "failure of his issue" to B, the rule

¹ Coggins' Appeal, 124 Pa. St. 19.

² Gates v. Seibert, 157 Mo. 254.

formerly well established was to construe "failure of issue" as indefinite failure of issue, that is, as meaning the extinction of all descendants at a period however remote. As this construction gave A a fee tail, and a fee simple can be limited on a fee tail at common law, the limitation to B was good. But since most States have now done away with the fee tail as it stood at common law, such a devise to B offends against the rule as to perpetuities. The modern tendency, set forth in the statutes of a number of States, is to construe "failure of issue" as definite failure of issue, that is, as meaning the absence of issue at the death of the first taker. Under such a construction it will be seen that the limitation over is good, as far as the rule concerning perpetuities is concerned.

The rule against perpetuities is recognized in all States of this country. In many States legislation has made the rule more stringent than at common law. Thus at common law the limitation may be made dependent on an indefinite number of lives. In many States the statutes provide that the limitation cannot depend on more than two lives.¹

§ 421. **Accumulation of the Income.** — The romantic disposition made in the celebrated will of Peter Thellusson, whereby the income of his ample estate was to be accumulated and added to the corpus for a period covering the life of every child and more remote descendant born or *en ventre sa mère* during his lifetime, and then, swelled to princely magnitude, to go to some unknown scion, led to the enactment of a statute² limiting the accumulation of rents, issues, profits, or produce of any estate to the life or lives of the donor or donors, or the term of twenty-one years from their death, or the minority of any person *in esse* at the time of such death, or the minority of those who would be entitled to the produce if of age. Similar limitations as to the accumulation of property have been enacted in some of the American States.³

In the absence of statutory provisions on the subject, accumulations are in the United States still governed by the common

¹ The various statutory changes are given in Woerner on Administration, § 427.

² 39 and 40 George III.

³ See Woerner on Administration, § 428.

law, because the statute of 39 & 40 Geo. III. was enacted after the declaration of American independence, and is of no force here.

§ 422. **Gifts to Charitable Uses.** — Testamentary gifts to charitable uses are distinguishable from other testamentary dispositions in several particulars, owing to the high favor with which the law regards them, and which demands their most liberal construction with the view of accomplishing the intent and purpose of the donor; and this to an extent which will uphold and carry into effect trusts to charitable uses which cannot be upheld in ordinary cases.

The preamble of the English Statute of Charitable Uses¹ furnishes the basis for the test of what constitute charitable uses. All purposes are charitable which are within the principle and reason of this statute; including, self-evidently, many objects neither mentioned nor distinctly referred to therein.

The definition of legal charities formulated by Justice Gray seems sufficiently comprehensive to include all cases that may come under the rules applied to charities, and to exclude all cases to which they are not applicable. It is as follows:

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."²

Gifts of liberality and benevolence, or private charities, are not included in the class of testamentary dispositions which are favored by the law to the extent of excepting them from the rules governing ordinary devises and bequests in respect of the rule against perpetuities, mortmain, accumulations, certainty of intent as to the beneficiaries and method of execution, etc. Charities, in the legal sense, must contain some element of public benefit, open to an indefinite and vague number of persons, the particular beneficiaries to be selected or ascertained

¹ 43 Eliz. c. 4.

² *Jackson v. Phillips*, 14 Allen 539, 556.

by a method or agency indicated by the testator. So a devise to a corporation to distribute the rents among twenty-four persons named, as they may need assistance, is not a charity.¹ It has been held that an association for the purposes of mutual benevolence among its members only does not constitute an association for charitable uses.² So a trust for the erection of a monument, tomb, or vault for the donor or his family, or for keeping them in repair, is not generally held to be charitable use, but will be enforced if not void as a perpetuity. A bequest for a public cemetery, on the other hand, is a clear technical "charity."

§ 423. **Force of the English Statute of Charitable Uses in America.** — In England the question of what is a charitable use is determined with reference to the Statute of 43 Eliz. In a number of States in this country that statute has been abolished or never was in force under the decisions. Charitable uses are, in these States, governed by the same rules as are applied to other devises and gifts, except in so far as the statute of the State may have introduced a change.

In another group of States that statute is also held not to be in force, the distinction between charitable uses and ordinary trusts, formerly ascribed, in many of the States, to the operation of this statute, is held to emanate from principles of public policy recognized at common law, and announced by the courts before the enactment of the statute, which, in this respect, is but declaratory of the pre-existing common law. Hence the same rules are applied, in these States, as if the statute were in force.

In still another group of States that statute is held to be in force as part of the common law come over to us from England.³

§ 424. **Charitable Uses upheld where other Trusts fail for Indefiniteness.** — A well-defined distinction between charitable and other testamentary gifts consists in the liberality with which charitable intentions are carried out, under descriptions of the donees and of the objects of the testator's bounty which must be held void for uncertainty in any but charitable gifts. It is one of the essential qualities of a charity that the benefi-

¹ *Lily v. Hey*, 1 Hare 580.

² *Babb v. Reed*, 5 Rawle 151.

³ See Woerner on Administration, § 431.

ciaries be "an indefinite number of persons," and it has been said that "the thing given becomes a charity where the uncertainty of the recipients begins."¹ However uncertain, therefore, or indefinite or vague, the beneficial donees of a charity be, if the court is satisfied that the testator's object is a charitable use in the legal sense, and is enabled by the terms of the will to render the beneficiaries certain by means of trustees, appointed or to be appointed, such gift will not fail on the ground of uncertainty of the objects. But where the gift, although to a charitable use, is so indefinite as to be incapable of being executed by a judicial decree, it is invalid.

Gifts in charity to unincorporated societies, incompetent to take for want of corporate powers at the time of the testator's death, have been sustained upon their subsequent incorporation, or by the appointment of trustees by the court, or by recognizing the donees or heirs as trustees.

The doctrine that equity will not allow a certain and valid trust to fail for want of a trustee has a wide application when the will has an intent recognized as being charitable under the legal definition. Thus the court has appointed a new trustee, the trustee named in the will refusing to accept, even when the will gave the trustee discretionary powers.²

Even though the statement in the will of the purpose of the testator be so vague and indefinite that from such statement alone a valid charity could not be construed, courts seize on the discretion given the trustee in the will as eliminating the vagueness in the statement of the testator's purpose. "*Id certum est quod certum reddi potest.*"

It is obvious that it is more difficult to uphold a trust in which neither the ultimate beneficiaries nor the instruments or agents to carry it out are clearly pointed out, than one in which either of these elements of the trust is specific and certain. But there is some diversity among the several States, and not always perfect unanimity among the courts of the same State, as to the extent to which courts will go in giving effect to testamentary charities, either by creating trustees where such are wanting, or ascertaining the ultimate recipients.

¹ McLean, J., in *Fontain v. Ravenel*, 17 How. (U. S.) 369, 384.

² *Sawtelle v. Witham*, 94 Wis. 412.

The variance between States is so great as to how far they will go in upholding as a charity a trust which would clearly be too vague if made for any other purpose, that it seems impracticable to attempt any classification here. Authorities in one State may be of little value in another.¹

§ 425. Charitable Trusts continue indefinitely. — The duration of a public or charitable trust is not affected by the rule which limits the inalienability of property under a private trust to a certain time, and avoids any attempt to exceed this period. Such a trust may be perpetual in its duration, and a change from one charity to another, upon the happening of a certain event, has been held to confer a valid gift upon the second charity after two hundred years.²

In some of the States the rule against tying up property for a certain purpose is not relaxed in favor of charitable uses, but applies to them as fully as to ordinary testamentary dispositions.³

The rule in question prohibiting perpetual restraint of alienation is sometimes, in cases discussing this exception of charities from the rule, spoken of as a rule against perpetuities. But the subject has nothing to do with the doctrine discussed under that title in § 418. No exemption from that rule is given to charities. If the vesting of the limitation to a charity may possibly be delayed beyond lives in being and twenty-one years thereafter it is invalid, as in case of any other testamentary disposition.

§ 426. The Doctrine of Cy Pres. — We have seen (*ante*, § 416) that when the will directs a purpose to be accomplished, and points out the method, if the latter prove inadequate, it will be set aside, in interest of the overruling purpose. The principle applies to charities as fully as to any other trust. Thus when it becomes impracticable to lease realty in the manner directed by the will, the sale of the land has been authorized to produce the fund to support the charity.⁴

Cy pres is a broader doctrine, as applied to charities. When

¹ See numerous authorities in Woerner on Administration, § 429.

² *Christ Hospital v. Grainger*, 16 Sim. 83, 101; s. c. 1 MacN. & G. 460, 463.

³ For list of States, see Woerner on Administration, § 429.

⁴ *Lackland v. Walker*, 151 Mo. 210.

the evil to be relieved by the charity ceases to exist, what shall be done? It must be remembered that the charity is perpetual. What shall be done with a fund for the relief of fugitive slaves after slavery has been abolished? Under the *cy pres* doctrine the donor's intention will be carried out as nearly as possible by substituting for the charity which has terminated another, analogous to it, and in the spirit inspiring the donor's original gift.

Passing the history of *cy pres* in England, it may be said that in America the doctrine of *cy pres* can exist only as a judicial rule of construction, — to assist in *carrying out the testator's charitable intention*. Hence, if it be clear that the testator meant to confine the execution of his purpose to the exact method pointed out in the will, or if the charitable purpose is limited to a particular object or institution, then the substitution of another method or object would be subversive of his intention, and not a *cy pres* execution of his purpose. To this extent, and in this sense, the doctrine is recognized in a number of States.

In probably as many States, however, it is repudiated, even to the extent named, and courts apply the same rules in rejecting a will which cannot be carried out as are applied in gifts not charitable.¹

§ 427. **Bequests for Masses for the Dead.** — As stated *ante*, § 414, bequests for masses for the dead are not subject to attack in this country on the ground that they are for superstitious uses.

Is such a bequest a technical charity? If it is viewed as solely for the benefit of the dead, it is difficult to bring it under the preamble of the 43rd Elizabeth, or under Judge Gray's definition, quoted § 420, *ante*. Viewing the saying of masses, however, as an act of public worship, the bequest would seem clearly a technical charity, and the testator's belief that the souls of the dead are to be benefited seems no reason for invalidating it. The rulings as to the validity of such a bequest as a charity are divided.²

¹ See Woerner on Administration, § 432.

² It is a charity: *Hoeffler v. Clogan*, 171 Ill. 462; *Schouler*, Petitioner, 134 Mass. 423. It is not a charity: *Festorazzi v. St. Joseph's Church*, 104

Another view denies any trust in the bequest, but upholds it as an absolute gift to the donee (church, priest, etc.) without legal qualification, the donee being merely morally bound.¹

Ala. 327, also authorities in New York and Wisconsin, but in the latter States the decisions rest on a narrow construction as to all charities.

¹ See *Sherman v. Baker*, 20 R. I. 446.

PART II.
OF CARRYING WILLS INTO EFFECT.

CHAPTER XLVIII.

LEGAL INCIDENTS AFFECTING DEVISES AND LEGACIES.

§ 428. **Lapse of Testamentary Gifts by the Death of the Donee before that of the Testator.** — As a general rule the devise or bequest to one who dies before the testator becomes void, even if the testator knew the legatee to be dead when making the will. The reason of the rule applies to all cases in which the capacity of the donee to take the devise or legacy has ceased to exist before the will takes effect. Hence the legacy to a corporation lapses if its charter has expired before the testator's death; so also, a gift to one of consumable articles for life, or so long as she shall remain unmarried, lapses by her marriage before the testator dies. The insertion after the name of the legatee of the words "his heirs," "executors or administrators," "assigns," or the like, will not prevent the application of the rule, in so far as they may be regarded as the expression of the testator's intention to pass to the legatee the absolute property in the estate; but if they are so used by the testator as to indicate his intention that the persons designated should take by substitution in case of the first-named legatee's intermediate death, — not by succession, but by appointment of the testator, — the gift will not lapse, but go to the person so indicated.

A devise or legacy to a class, though as tenants in common and not as joint tenants, does not lapse by reason of the death of one or more of the individuals constituting the class before the testator. The distinction between a gift to a class as such, and to several individuals who may constitute a class, is that in the former case the testator intends to benefit those who con-

stitute the class, excluding all others; while in the latter his purpose is to benefit the several individuals named, whether they constitute a class or not; the class designation serving as *descriptio personæ*. Hence if it appear that the testator intended to provide for a number of persons as a class, although the estate is devised or bequeathed to the individuals by name, the share of any of them dying before the testator will not lapse, but go to the survivors of the class; but where the gift is to several persons by name, a presumption arises, in the absence of any indications in the language of the will to the contrary, that it is to them severally and *nominatim*, and not collectively, although the persons named may constitute a class.

Hence in such case the share of any beneficiary who dies before the testator lapses.

The distribution of the gift to a class has nothing to do with any theory of joint-tenancy. The rule applies when the gift to the class is construed as given to tenants in common.

§ 429. Statutory Exceptions in Favor of Representatives of Deceased Legatees. — The several States have provided by statute that the rule mentioned in the preceding section shall not apply in cases where the devise or bequest is to children, grandchildren, or other descendants of the testator who die before him, leaving issue living at the time of his death. This statutory exception is confined to those claiming under donees who are descendants of the testator in one class of States; and extended to other relatives, besides children, in another.¹

The effect of these statutes is to vest in the lineal descendants of the deceased legatee or devisee the interest which the latter would have been entitled to if *in esse* when the will took effect. But, as in all cases of testamentary disposition the testator's intention controls mere rules of construction, so these statutes will not be allowed to divert the gift contrary to the ascertained intention of the testator.

Where the legacy is directed by statute to go to the children or other descendants of a deceased legatee, they take directly, to the exclusion of his executors or administrators, in the same proportions as if they took as his heirs at law or distributees, the widow taking no interest therein. But whether they take ab-

¹ See Woerner on Administration, § 435.

solutely, or subject to the equities existing against the primary legatee, the authorities are not agreed.¹

§ 430. **The Doctrine of Lapse as affected by the Contingent or Vested Character of the Devise or Legacy.** — As in the case of a simple devise or legacy the death of the donee before the will can take effect will cause the gift to lapse, so in the case of a contingent devise or legacy the same result will follow the death of the devisee or legatee before the happening of the event upon which the gift becomes absolute, although his death occur after that of the testator. Whether a legacy is vested or contingent depends upon the language of the will creating it; and the following rules, formerly applied in the ecclesiastical courts, are recognized in America in aid of its construction: First, that a bequest *payable* at a given time certain to arrive creates an interest vesting on the testator's death (as *debitum in præsentibus solvendum in futuro*), transmissible to the legatee's representatives; second, legacies *given at* a certain age, or *if, when, in case, or provided* the legatee attain such age, or any future definite period, annex the time to the substance of the gift, so that the legacy depends on the legatee's being alive at the time so fixed; in other words, a legacy is to be taken as contingent or vested, just as the contingency, if any, is annexed to the gift, or to the payment of it; and so in respect of the devise of remainders in real estate.

The rules illustrate the leaning of courts toward a construction of interests as vested rather than contingent. It must be remembered that these rules are only guides for construction, and must give way when the context of the will shows that the testator had a different intention.

§ 431. **Devolution of Void and Lapsed Devises and Legacies.** — A distinction was observed in respect of devises void from the beginning, because there never was a devisee competent to take, and such as were good when made but became inoperative for some after-arising cause, and therefore *lapsed*. This distinction led to the recognition of a difference in the rights of heirs and residuary devisees respectively to void and lapsed

¹ *Denise v. Denise*, 37 N. J. Eq. 163, 168, is the leading case charging the substituted or "statute-made legatee" with the primary legatee's death. There are many contrary cases. See Woerner, § 435.

devises. The testator was presumed to have given to the residuary devisee all that he intended him to have, and that therefore he *intended him to have no more*; hence the heir at law was held entitled to lapsed devises; but since a void devise does not constitute a testamentary act, the property mentioned therein cannot be said to have *been given* to any one, and must therefore be included in what is given to the residuary devisee.

Besides, since under common law the will spoke as to realty as of its date, and not as of the date of the testator's death, it could not dispose of property acquired after its execution, and hence the residuary clause could not dispose of such property as fell into the estate by lapse after the will was executed.

As to void and lapsed legacies, however, the controlling considerations are different.

If real estate is not devised, it descends to the heir; hence the heir is held to take, to the exclusion of residuary devisees, in the absence of statutory modification of the rule, all lapsed devises not otherwise disposed of by the will. But as to the personal estate, the executor anciently took it for the purpose of disposing of it according to the testator's direction, and was allowed to retain for his own benefit any surplus remaining after paying funeral expenses, testamentary charges, debts, and legacies; it was natural, therefore, that the residuary legatee should have a better right thereto than the executor. Hence the rule is, that as to the personalty the will speaks from the time of the testator's death, and the residuary legatee takes not only what is undisposed of by the terms of the will, but that which becomes undisposed of at the death by disappointment of the intention of the will. This, whatever be its origin, is the rule still in force generally in the United States as to personalty. It is obvious, however, that, if the residuary legacy itself lapses, the testator, as to that, died intestate; hence where the will gives to several persons specific shares of the residue, the share of such of them as may die before the testator will go to the next of kin.

§ 432. **The Devolution of Void and Lapsed Devises and Legacies as affected by Statutes.** — An English statute directing that, in the absence of a contrary intention apparent from the will, all void and lapsed devises shall be included in the residuary devise,

if any, has substantially put real estate and personal property on the same footing in respect of void and lapsed devises and legacies. Statutes to the same effect exist in several States.¹

Apart from these statutes directly abolishing this peculiar rule as to lapsed devises, the same result is held to flow indirectly from the statutes enacted in many States which make the will speak as of the testator's death with reference to his realty, as well as with reference to his personalty, whereas at common law the will did not dispose of realty acquired after the date of the will. It is accordingly held in numerous States, that the effect of directing the will to speak and take effect as to realty as well as personalty as if executed immediately before the death of the testator is, in removing the distinction between real and personal estate, to sink all void and lapsed devises and legacies into the residuum, unless the contrary intention is indicated in the will.

§ 433. **Remainders, and Executory Devises and Bequests.** — If a testator give to one a particular prior estate, and to another what remains upon the termination of the prior estate, the remainder is *vested* if the words creating it point merely to the deferred possession or enjoyment, and will be so construed if they dispose of the ulterior estate expressly in an event certain upon which the prior estate is to determine; but the remainder is *contingent* if limited to an uncertain person, or dependent upon an uncertain event. In the former case, both the prior and ulterior estate vest at the testator's death, — that of the one in possession, and that of the other in remainder; in the latter case, the ulterior estate does not vest in the remainderman before the contingency upon which it depends has occurred. On feudal principles, as embodied in the common law, there can be no remainder without seisin in either the remainderman or the tenant of the particular estate, from which "imperative feudal dogma of the common law," as Washburn terms it, arises the doctrine, that the devise of a future contingent interest not preceded by a freehold estate devised in the same will, or any future interest directed to take effect at a time not coincident with the limitation of the prior estate of freehold, can only take effect as an executory devise. So of personal property,

¹ See Woerner, § 438.

in which a remainder may likewise be limited after a prior estate. Hence an executory devise (or bequest) is said to be such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of law in conveyances at common law.

A discussion of the estates arising under the Statute of Wills and the Statute of Uses cannot be attempted in this book. The subject pertains to the law of real estate. Only a few principles of frequent application in the construction of wills can be mentioned.

One of the doctrines of the common law which are rejected in executory devises is the rule that a fee cannot be limited after a fee simple. But this can be done by way of executory devise. A devise to A in fee, but if he should die leaving no issue at his death, then to B in fee, is bad at common law, but good as an executory devise.

There is one marked exception to this rule permitting the limitation of a fee simple on a fee simple by way of executory devise. A valid executory devise cannot be limited after a fee upon the contingency of the non-execution of an absolute disposing power vested in the first taker. Such a limitation over is void in its creation. This exception has been questioned, and it would seem with good reason, but is established under the decisions.

It should be observed, that the rule does not apply to a power of disposition given to the donee of an estate expressed to be for life only; the addition of the power does not enlarge the life estate into a fee, and the devise over will be good. Nor does it apply where the devise over is not dependent upon the event of death simply, but upon death in connection with some collateral event, or death without issue, or without children, the tendency of the courts is to lay hold of slight circumstances to take it out of the rule above stated, and give effect to the natural import of the words under the circumstances. The rule applies only when the first gift is absolute and unrestricted.

When the estate is given in fee, with a provision that on the happening of a contingent event the estate shall go to another, obviously, when the possibility of the happening of the contingency is at an end, the first taker has an absolute fee, re-

lieved of all conditions. A gift to A in fee, provided that if a child is born to B the estate shall go to that child in fee, leaves A an absolute estate if, and as soon as, B dies childless. And conversely, if the prior estate lapse or fail, as where, for instance, a widow refused to take the life estate willed to her, the gift over will take effect as an executory devise. The defeat of a particular estate, void in its creation by reason of being limited to a person incapable by law of taking, or who refuses to take, operates to accelerate the remainder immediately expectant thereon, which then vest upon the death of the testator; but the acceleration does not affect possession or enjoyment, if by the terms of the devise over it is to take effect at a particular time.

Cases are very numerous in which the testator gives the estate to his widow for life if she continue a widow, and over *if she shall marry*. The rule is, that in such cases the widow takes an estate *durante viduitate*; the gifts over are vested remainders, taking effect on her marriage, or, if she die unmarried, at her death.

§ 434. **Devises and Legacies on Condition.** — It requires no particular form of words to annex a condition to a devise or legacy; it is sufficient if the testator's intention to that effect appear. Conditions are either precedent or subsequent; if the former, the donee takes no vested interest before the condition is performed; if the latter, the interest vesting before is divested by non-performance or breach of the condition. Whether a condition be the one or the other is sometimes difficult to ascertain, for there are no technical appropriate words to mark the distinction; it is always a question of intention, to be found from the language of the will. If the act on which the estate depends does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent. Two general rules are stated by Chief Justice Marshall, which may assist in the construction of wills on this point: "It is a general rule that a devise in words of the present time, as, 'I give to A my lands in B' imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition, for the performance of which no time is limited, the

devisee has his life for performance.”¹ Thus, if the condition imposed is impossible of execution without enjoyment of the estate, or is of a contingent nature so that it is uncertain whether it will ever be required, it cannot be a condition precedent, although words so indicating be annexed to the gift.

On the other hand, if a devise of one thing be in lieu or in consideration of another, that which is to be done by the devisee constitutes a condition precedent. So if, by the terms of the will, a thing is required to be done by the devisee or legatee before he gets the estate; if, for instance, the gift is of anything to be selected by the donee, the selection is a condition precedent.

If the condition subsequent is illegal, it is a nullity. If the performance of a valid condition subsequent is made impossible by act of God, its performance is excused. So, also, it may be waived by the party to be benefited by its performance. In all these cases the condition subsequent is at an end, and the donee has an unconditioned estate.

On the other hand the rule is that the impossibility of performing a condition *precedent* destroys the devise or bequest itself even though there be no default or *laches* on the part of the devisee or legatee. But if the party who imposes the condition himself makes its performance impossible or unnecessary, it ceases to be binding, and the estate conveyed is discharged therefrom. Indeed, it is held that if the donee does all in his power to fulfil a condition which requires concurrence of another, and that other capriciously refuses, the condition does not bind. Such was the holding when the condition precedent was the reconciliation of the devisee with her brother within one year from the testator's death.²

§ 435. Repugnant Conditions. — We have just seen that when the condition subsequent is invalid in law, the estate devised or bequeathed passes absolutely, without condition. This situation arises when the testator devises property in fee and attaches conditions as to its use which are inconsistent with the title conferred, and in contravention of the policy of the law. Such provisions are called repugnant conditions, and are void. Thus, a devise to the testator's children “in case the same con-

¹ *Finley v. King*, 3 Peters 376.

² *Page v. Frazer*, 14 Bush 205, 209.

tinue to inhabit the town of Hurley, otherwise not," is void.¹ So a condition against alienation; or that the land shall not be liable to execution or attachment, or to the law of descent, or which restricts the use of an absolute gift. Whether there can be any restraint whatever by condition subsequent upon the alienation of a fee simple is not entirely settled.

It is held, on the one hand, that a condition against alienation for a specified time, or to a particular person, may be valid; but it is now generally held, that the condition is equally void, whether the restriction be indefinite or for a certain time only.

It is held generally in this country, that the rule against conditions in restraint of alienation of estates in fee simple (including restraint on the power of voluntary, and of liability to involuntary alienation) does not apply to life estates. But several States, following English precedents, hold restrictions on alienation of life estates repugnant to the estate, and therefore void.

§ 436. **Spendthrift Trusts.** — From the foregoing sections it results that the testator cannot protect the devisee to whom he has given property in fee simple from the results of his improvidence by a condition in restraint of alienation. But the testator can practically secure his object through a limitation over by way of executory devise, as distinguished from a condition subsequent, in the event of attempted alienation.

A provision in a will that the bounty bestowed upon one person shall go to another in an event which would subject it to the claims of creditors, is valid. The way usually adopted for effectuating this object is the creating of a so-called "spendthrift trust." The trust is active, so that the trustee has the full legal title. The spendthrift is usually given only an equitable life estate. Where the law permits restraint of alienation in life estates, a limitation over in the event of voluntary or involuntary alienation is good.

§ 437. **Bequests conditioned on Religious Qualifications.** — Whether a condition to a bequest requiring religious qualification is against the policy of the law in the United States is not clearly settled. It was so held in Virginia, upon the ground that a restriction imposed as a condition upon the enjoyment of a bequest, requiring that the legatee shall be a member of any

¹ Newkerk v. Newkerk, 2 Caines 345, 352.

religious sect or denomination, is directly violative of the policy of the law guarding the rights of conscience.¹ But the Supreme Court of South Carolina reversed the decision of the Circuit Court holding the above doctrine, in a case involving, aside from the question of public policy, great hardship to the legatee.² So in Maryland, a condition that the legatee should withdraw from the priesthood or membership of any order or society connected with the Roman Catholic Church is held valid.³ The Supreme Court of the United States held that a condition excluding ecclesiastics, ministers, and missionaries from a college founded by the testator is not void in Pennsylvania.⁴

§ 438. **Condition for Separate Life of Married Couple.** — A condition that the donee shall not live with, nor contribute to the support of, his wife, is not only contrary to public policy and good morals, but in direct violation of the law, and is therefore void; and although, being a condition precedent, it would at the common law destroy the gift, yet in equity, as under the civil law, the condition is void, and the gift good as to personalty. But where the intention of the testator is to protect the wife against want in case of separation, not to make separation the consideration for his bounty, the condition is valid.

§ 439. **Condition against Disputing the Will.** — It seems to be held in England, that conditions against disputing the will are to be regarded *in terrorem* only when annexed to bequests of personal property, if there be no legacy over to another upon breach of the condition; but that they are valid as to real estate, whether there be a gift over or not. In America, the preponderance of authority seems to incline in favor of their validity in either case. The rule that one cannot claim the benefit of a will and also claim against it, is fully applicable.⁵

§ 440. **Conditions in Restraint of Marriage.** — By the civil law, all conditions in wills in restraint of marriage are void, whether they are precedent or subsequent, with or without a

¹ *Maddox v. Maddox*, 11 Grat. 804, 814.

² *Magee v. O'Neil*, 19 S. C. 170, 185.

³ *Barnum v. Baltimore*, 62 Md. 275, 290, relying on *Mitchell v. Mitchell*, 18 Md. 405, 411, and *Ex parte Dickson*, 1 Sim. (N. S.) 37, in both of which the condition was against the devisee's becoming a nun.

⁴ *Vidal v. Girard*, 2 How. (U. S.) 127, 197.

⁵ See *Woerner, Administration*, § 442 and authorities there cited.

gift over, and however qualified. This rule seems at one time to have been adopted by the ecclesiastical courts of England, and in a great measure by the courts of equity. The jurisdiction of the English ecclesiastical courts was confined to personal property; real estate was subject to the rules of the common-law courts, where this doctrine of the civil law never prevailed. Although these also deny validity to conditions in *general* restraint of marriage, even if followed by a devise over, yet they give effect to such conditions as require the consent of guardians or relatives to marriage, either at a particular or at any age; and conditions that the devisee shall not marry a specified person, or before a stated age, or in a particular manner, or the like, so that the restraint is not of marriage in general, are held lawful.

An opinion rendered by Brent, J., at *nisi prius*, and affirmed by the Court of Appeals of Maryland, gives a very clear and concise statement of the rule deducible as being in harmony with the preponderance of authority: "If either real or personal estate be devised upon a condition precedent to the vesting of the estate, coupled with a devise over upon breach of the condition, the devise or bequest is good, and the restraint effectual to defeat the estate. If the estate be real, the condition precedent in restraint of marriage will be good, whether there be a devise over or not, and whether the restraint be general or qualified. If the estate be personal, the condition precedent, in general restraint of marriage, will be void if there be no limitation over, but if there be a limitation over it will be good. In regard to conditions subsequent, if they be in general restraint of marriage, and there is no limitation over, they are void as to both real and personal estate. If in general restraint of marriage, and there is a limitation over, they are void as to personal estate. But as to real estate the cases are in conflict. The later and better opinion, however, seems to be, that even in that case the limitation over should prevail. If the condition subsequent be in limited and qualified restraint of marriage, it will be good, provided it be accompanied by a limitation over. If there is no limitation over, it will be construed as *in terrorem* only, and not an imperative condition.¹

Restraint on remarriage of a man or woman is held to be

¹ Gough v. Manning, 26 Md. 347, 351.

valid, it is believed, in all States. In a few such restraint in the form of a technical common-law condition is not good; but even in these States it is held good if put in the form of a limitation over. On this distinction under a bequest to a widow *if she do not marry*, she takes the legacy whether she marries or not; but if the bequest is *until she marry*, she will forfeit it by her remarriage.

§ 441. **Classification of Legacies.** — Legacies are classified as specific, general, demonstrative and residuary. The distinction between *specific* and *general* legacies is, that the former single out the particular or specific thing which the testator intends the donee to have, no regard being had to its value; while the latter are payable out of the general assets, the chief element of the gift being its quantity or value.

Specific legacies differ in their effect from general legacies in two important particulars. The great advantage of the former, to the legatee, consists in their immunity from abating with general legacies, which will be more fully considered hereafter. On the other hand they are subject to the disadvantage of having no recourse against the general estate in case the thing given be lost, adeemed, or from any cause lessened in value, for recompense or satisfaction.

There is a third class of legacies, known by the name given them in the civil law as *demonstrative* legacies, differing from general and partaking of the nature of specific legacies in that they are not liable to abate with general legacies upon a deficiency of assets, and on the other hand differing from specific and partaking of the quality of general legacies, in so far as, if the fund fail, the legatee will be entitled to receive the legacy out of the general assets. A demonstrative legacy is a pecuniary legacy, or legacy of quantity, the particular fund or personal property being pointed out from which it is to be taken or paid.

The intention of the testator is of course decisive in determining whether a legacy belongs to one or another of these classes, as the division itself into classes is but the means of carrying such intention into effect.

If a testator leaves a specific thing say "my horse Poseidon, worth \$500.00," we have a specific legacy. If the horse is not in existence at the testator's death, clearly the legatee has no

claim for its value. If the testator bequeaths merely "a horse worth \$500.00," without referring to any particular horse, this is a general legacy, since it is satisfied by delivering to the legatee *any* horse of the stated value. And if the testator leaves \$500.00 to X., directing that it shall be paid out of the funds of the testator deposited in a specified bank, there is a demonstrative legacy. The prime object of the testator was to give X. \$500.00. If the amount is in the designated bank, it should be paid from that source, as if it were a specific legacy. But if there are no funds there, or insufficient funds, the bequest, or the balance, should be paid out of the general estate as a general legacy.

Courts proceed upon the presumption that the testator intended a real benefit to the legatee, and hence incline to consider legacies as general, rather than specific, if the language of the will admits of such construction.

Stocks, securities, or shares in corporations are specifically bequeathed, if they are clearly referred to as distinguished from such stocks, etc., generally; the word "my" is sometimes sufficient, if qualifying the stock, annuity, etc., bequeathed, to make a specific bequest, as "one-half of all *my* stock," etc.

All devises of real estate, including chattels real, are said to be specific in their effect. But this doctrine is materially affected by the abrogation of the common-law rule from which it emanates, limiting the operation of the devise of real estate to such as the testator was seised of at the time he executed the will. In States where the will passes real estate acquired after its execution, no devise of lands will be considered as specific, unless it be specifically designated; at least not so far as after-acquired lands are in question. The same effect is ascribed to the English statute of 1 Vict. c. 26, § 25; and the American view seems to be that the enactment of these statutes places real and personal property, in this respect, on the same level.

Residuary legacies are bequests by which the testator disposes of what is left after the satisfaction of debts and prior legacies. A general residuary clause is not the less general because some of the particulars of which it may consist are therein enumerated, unless it is deducible from the context that the testator meant the words in a different sense.

§ 442. **Cumulative, Repeated, and Substituted Legacies.** — A legacy bequeathed twice to the same person may be either *cumulative*, if the testator intended the legatee to have *the two* legacies given him in the same will, or in a will and a codicil; or the second may be only a repetition of the bequest of the first, in which case the legatee will take *but one* legacy. This is a question of intent, to be ascertained from the testator's will, construed with reference to any circumstances which the court may lawfully consider. When uncertainty still remains, the question must be solved by rules of construction, establishing a presumption of intention for the case. Where the legacies are of equal amount, the second is presumed to be a mere repetition, if found in the same instrument; but if found in a different one (a codicil to the will first giving the legacy), the second is presumed to be cumulative. When the legacies to the same legatee are of unequal amount, though found in one instrument, one is not merged in the other; the legatee takes both.

§ 443. **Ademption and Satisfaction of Legacies by Act of the Testator.** — A legacy is, strictly speaking, *adeemed* (from *adimere*, to take away) when the thing given has, by some act of the testator, ceased to exist in the form in which it is described in the will, so that on his death there is nothing answering the description of the legacy to be given to the legatee. This, of course, can only happen in cases of specific legacies, since general or demonstrative legacies are not dependent upon the existence of specific things, and cannot therefore be *adeemed*, or taken away, by the destruction or alteration of the subject of the gift. A similar result follows where the testator performs the function of an executor, by giving during his lifetime what he intended the legatee to have by his will, thereby *satisfying* the legacy himself, leaving nothing for the executor to do in respect of such legacy. The distinction between the *ademption* and *satisfaction* of legacies seems clear enough, but it is not generally observed, the term "ademption" being broadly used to include "satisfaction." The specific bequest of a debt or fund owing to the testator is adeemed by the payment of the fund or debt to the testator during his lifetime, and the receipt by the testator of part of such debt, or the alienation or change of part of stock specifically bequeathed, will be an ademption *pro tanto*.

There is conflict in the authorities as to whether the ademption of the debt results from the mere fact that the debt has ceased to exist, or whether it is evidence of a revocation by the testator. Where the testator, having forgiven a debt in his will, becomes subsequently insane, and a guardian collects that debt in the testator's lifetime, this issue must be met. Under such circumstances there is conflict in the rulings.¹

Where the testator's interest in property bequeathed is altered, or a fund converted into property of a different description, by the operation of law, or without the testator's consent, there will be no ademption; nor is the identity of a debt lost, so as to cause it to be adeemed by the renewal from time to time of notes given to secure it.

§ 444. **Legacies in Satisfaction of Debts.** — If a testator, having given a legacy in discharge of a debt or with a view to accomplish some particular purpose, himself pays the debt or carries out the purpose in his lifetime, the legacy, being thus satisfied, is thereby cancelled. A legacy expressly given to pay a debt is satisfied by its payment by the testator in his lifetime, although larger than the debt. In connection with this principle, a rule was established in the English equity courts, that, where a debtor bequeaths to his creditor a legacy equal to or greater than the amount of his debt, it shall be presumed, in the absence of a contrary intent inferable from the will, that the legacy was intended to be in satisfaction of the debt. The American courts recognize the rule, but regret its existence, and lean to a contrary presumption whenever the testator's language, or even circumstances, proved *aliunde*, enable them to disregard the ancient rule. For instance, the rule was not applied when the debt was for an unliquidated amount; nor where the debtor-legatee was one of several to whom equal amounts were bequeathed.

On the other hand, the bequest of a legacy to a debtor does not *per se* release or extinguish the debt. The testator's intention to add to the legacy the release or discharge of the legatee's

¹ Under such circumstances the debt is considered adeemed in: *In re Freer*, 22 L. R. Ch. Div. 622, and *Hoke v. Herman*, 21 Pa. St. 301. The contrary is held in the later case of *Wilmerton v. Wilmerton*, 176 Fed. (C. C. A.) 896.

debt to him must appear by clear expression or necessary implication.

Since the release of a debt by a testator is but a bequest, such debt is, like any other bequest, liable to be taken as assets to pay the testator's debts; and the executor may, where the legatee is indebted to the testator, retain the legacy, either in partial or full satisfaction of the debt, by way of set-off.

§ 445. **Ademption of Legacies given as Portions.** — According to an arbitrary doctrine prevailing in courts of equity, a legacy given by a father, or person *in loco parentis*, to a child or grandchild, is completely adeemed if he afterwards, during his lifetime, advances a portion for that child, on the occasion of its marriage or otherwise; and the ademption is complete whether the advancements are larger than, or equal to, or smaller than the testamentary portions. The doctrine seems to have originated in the reluctance of equity courts to sanction a rule which might allow double portions to children. To avoid such possibility, they created the presumptions according to which every legacy from a father to his child is *prima facie* intended as a portion, and that every advancement to such child by the testator during life is intended as a satisfaction of such portion. "Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence."¹

The original severity of the rule raising the presumption of intention to adeem a legacy by the advancement of a portion less in amount, has been relaxed, however, so that now such advancement operates as an ademption *pro tanto* only.

Modern courts seek reasons to avoid the rule. It has been held that, where there is great disparity between the gift *inter vivos* and the legacy, the latter being greatly in excess of the former, the gift is not regarded as either a portion or an advancement, so as to operate as an ademption or satisfaction *pro tanto*, if not so expressed by the testator, or clearly indicated by the circumstances. So the gift of small sums, from time to time, is not regarded as a satisfaction or ademption of a legacy by a father, or one *in loco parentis*, to a child, even *pro tanto*; nor a provision not *ejusdem generis* with the legacy, unless an

¹ *Weston v. Johnson*, 48 Ind. 15.

intention to such effect be clearly apparent or expressed. Specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion.

§ 446. **Admissibility of Parol Evidence on Questions of Ademption.** — Upon the question of ademption of general legacies, — more accurately of their satisfaction by the testator, — intention is of the very essence; and as this question is determined by the effect of an act of the testator intervening between the execution of the will and his death, it is obvious that parol evidence must be resorted to, — not to ascertain the testator's intention in giving the legacy, — but to establish or disprove the act alleged to work the ademption or satisfaction of the legacy, as well as the circumstances which may explain the motives and object of such act, to show whether the testator intended it to affect his will or not. As to the declarations of the testator concerning an act claimed to be an ademption of any legacy, it seems clear that his statements at the time of the act, accompanying it and giving it its character, are admissible under all circumstances as part of the transaction.

Where the declaration is made subsequent to the act, and tends to uphold the will, it is generally receivable as being an admission against the interest of the testator and those claiming under him against the contested legacy.

In all other cases another rule of evidence must be taken into consideration.

Parol evidence is also admissible upon the principle that a presumption of intention, raised by a rule of construction, may be rebutted or confirmed by the application of parol evidence of a different intention on the part of the testator, and any doubt raised by parol testimony may be resolved by the same kind of evidence.

§ 447. **Statutory Provisions affecting Ademption of Satisfaction of Legacies.** — By the English Wills Act it is provided that "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, . . . shall prevent the operation with respect to such

estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.”¹ Similar statutes exist in several States. A New York act, practically doing away with the presumption of the satisfaction of legacies by advancements is the basis for legislation in several other States. On the other hand, in a few States this doctrine of the effect on legacies of subsequent advancements is extended to all legatees, whether or not the testator stood to them *in loco parentis*.²

¹ 1 Vict. c. 26 § 23.

² For fuller statement of statutory changes, see Woerner on Administration, § 450.

CHAPTER XLIX.

OF THE SATISFACTION OF LEGACIES BY THE EXECUTOR.

§ 448. **Preference of Creditors over Legatees.** — It has already been mentioned, in connection with the subject of the payment of debts, that the claims of all creditors must first be discharged before the legacies can be paid.

When all the debts proved against an estate have been fully satisfied, or a sufficient amount of assets reserved for the payment of such claims as may be in litigation or payable at a future time, legatees are entitled to satisfaction of their bequests, if there be assets for that purpose in the hands of the executor. If the assets remaining are insufficient to carry out the provisions of the will in every particular, they must be applied as far as they go in the manner and priority directed by the testator. If, however, it cannot be ascertained from the testator's words upon which of the legatees he intended the loss to fall in case their legacies could not all be satisfied, the law directs a certain order in which they abate; and it will be necessary to consider briefly the rules according to which this order of payment is determined.

§ 449. **Order in which Legacies abate.** — In the absence of a contrary intention inferable from the words of the will, it is to be presumed that the testator meant to discharge his liabilities and obligations before giving his estate in bounty; hence legacies given for a valuable consideration, or for the relinquishment of a right or interest, are entitled to priority of payment over voluntary general legacies. Thus, a provision for a widow in lieu of her dower right entitles her to take as a purchaser for a valuable consideration, not subject to that abatement to which general legacies are subject. To give the legacy this preference, obviously, the testator must have left property to which the widow's dower right attached. The provision in lieu of dower is held to be superior to specific, as well as general

legacies; these must abate if necessary to satisfy the same. But whether specific devises of real estate abate in favor of such provision is not so unanimously held.

It is also presumed that, by singling out a specific article by way of a specific bequest, the testator intends that the legatee shall take in preference to those legatees whose bequests are not specifically pointed out; hence the rule is, that specific legacies do not abate, except in favor of such legacies as were given for a valuable consideration, or among themselves. It has been mentioned, that all devises of real estate are in their nature specific; and the question is therefore of frequent occurrence, whether devises have preference over specific legacies. It is now generally held, that, other assets failing so that it becomes necessary to resort to specific legacies for the payment of debts, these abate ratably with specific devises.

Demonstrative legacies, as already pointed out, are classed with specific legacies in this respect. If the fund pointed out for their payment fail, they are payable out of the general assets not specifically bequeathed, or out of funds covered by residuary bequests, and do not abate with legacies general in their nature. If, however, the fund out of which a demonstrative legacy is made payable fails, or is inadequate to satisfy it in full, the legatee has no preference as to the unsatisfied remainder of the demonstrative legacy over general legatees, but takes as a general legatee, and his legacy abates with other general legacies.

General legacies abate proportionately if the assets are not sufficient to pay them all, unless an unequivocal preference is given to some one or more of them by the words of the will, except as to such of them as are given for a valuable consideration, which have the same preference over other general legacies as above indicated in respect to specific legacies. Annuities stand on the same ground with other general legacies, unless a different intention appear from the will itself. As between the general legacies, no preference results from the order in which they are named, nor from the use of such terms as "firstly," "secondly," attached to the legacies. Of course such facts, insufficient in themselves, may have weight with other considerations in arriving at the conclusion that the testator intended preferences.

Residuary legacies can hardly be said to abate, since the residuum is that only which is *left* after all express or prior dispositions of the testator have been satisfied; hence residuary legatees can in no case call upon general or specific legatees to abate. The rule is of course also true of a residuary devise. It has heretofore been shown that at common law the real estate of the deceased is not liable for his general debts; and that, while all personalty goes to the administrator for creditors, and for legatees or distributees, the realty goes to the heir or devisee without administration. As a proposition at common law, therefore, the devised real estate, including the residuary devise, could not be liable for legacies, even though they constituted a charge against all the personalty, unless the testator so directed. But courts were astute to find lurking in the testator's will a direction to subject the realty to the claims of legatees as well as of creditors. A leading illustration is the conclusion drawn from blending realty and personalty in the residuary clause of the will. If the testator, in the residuary clause, treats the real and personal property as forming one whole, without distinguishing the one from the other, he is presumed thereby to manifest an intention to charge the general legacies upon the land, because "residue" in such case can only mean what remains after satisfying the former gifts. There are some cases in which this rule has been disregarded, based upon and following the ruling of Chancellor Kent in *Lupton v. Lupton*;¹ but it is said to be well settled both in England and America, and even the New York cases now hold that, while the blending of the two kinds of property in the residuary clause is not sufficient of itself to charge the real estate, yet it is of great weight in ascertaining the testator's intention, which, of course, is always decisive.

§ 450. **Executor's Assent to Devises and Legacies.** — It follows from the principle vesting the entire personal estate of a deceased testator in his executor, that, before a legatee, whether specific, general, or residuary, can obtain a complete title to his legacy, he must obtain the executor's assent thereto; so that, if the legatee take possession of his legacy without such assent, the executor may maintain trespass or trover against

¹ 2 Johns. Ch. 614.

him, although the will expressly directs that such consent shall not be necessary to the legatee's right.

It is to be observed, that the subject of the executor's assent is of little or no importance in most of the States, because the statutes determine the time and manner of paying and delivering legacies, and point out the conditions under which the executor may fully protect himself against liability. In such States the legatee has no right to compel payment until an order of court is obtained, and this subject is discussed later.

§ 451. Time for paying or delivering Legacies. — Since the creditors of a testator must all be satisfied before any legacy is payable, the executor must be allowed a reasonable time to inform himself of the state of the property and the demands upon the same, before the legatees can compel him to satisfy their legacies. The period fixed by the civil law, and acquiesced in by common-law courts, is a year from the testator's death, within which the executor cannot be compelled to pay a legacy, although directed by the testator to be paid sooner.

Where a legacy is given upon a contingency or future event, occurring more than a year after the testator's death, it is payable immediately upon the occurrence of such event. A legacy given generally, subject to a limitation over on a future event, is payable to the immediate legatee, without security to repay the money in case the event should happen, unless it be shown that there is danger that the property will be wasted, secreted, or removed, when the court may require security to be given by the first taker.

Where a legacy is payable at twenty-one, and the legatee dies before reaching that age, it will, if the interest is given during the minority, be payable to the representatives immediately after the legatee's death; but if interest is not given, they must wait for the money until the legatee, if living, would have attained twenty-one.

Where legacies are made payable at a future time, the legatees may demand that a sufficient sum be set apart therefor; or the residue may be ordered to be paid to the residuary legatee on his giving security to pay the legacy when due.

In such cases of appropriation it may become a question upon whom the loss shall fall in case of depreciation or failure of the

fund set apart, or who shall benefit by its appreciation. The authorities are not entirely harmonious in this respect; but it seems clear, on principle, that, where an annuity is charged upon the whole personal estate, the executor cannot, by any appropriation, affect the legatee's right to the full annuity; and that where the testator intended the retention or appropriation of a sufficient sum to pay annuities, and payment of the residue meanwhile, all parties will be bound by the appropriation so made.

§ 452. **Time for paying Legacies fixed by Statutes.** — Most of the States regulate the time of paying or delivering legacies by statute, requiring this to be done whenever the time has expired within which creditors may prove their claims, and sufficient assets remain in the executor's hands to pay all debts and legacies. By far the greater number of the States, however, allow legacies to be paid before the expiration of the time for proving debts, if there be assets for the purpose, on bond being given by the legatees, conditioned that they shall refund their due proportion for the payment of all debts and costs subsequently established against the estate.

The time for the payment of legacies without refunding bond varies according to the time allowed creditors to prove their claims. If there are assets sufficient, they are payable on final settlement, or whenever it appears that no further claims of creditors can be established; if the assets are insufficient to pay all legacies in full, they are, on such showing, payable in the order heretofore indicated, abating *pro rata* as to any class that cannot be paid in full.¹

§ 453. **Payment of Bequests for Life with Remainder over.** — Where a testator bequeaths a residue consisting of money, or property whose use is the conversion into money, with remainder to another, it is the duty of the executor either to take security from the life tenant protecting the interest of the remainderman, or to convert the fund into cash and invest it for the benefit of all who are entitled under the will.

When the personalty willed to a person for life with remainder over to others, includes perishable property, either such as is

¹ For further details as to statutes, see Woerner on Administration, § 455.

consumed in its use (*e. g.*, hay, wine), or such as deteriorates in use (*e. g.*, furniture, an automobile), questions naturally arise as to the relative rights of life tenant and remainderman. May the life tenant drink the wine, and wear out the automobile? The intention of the testator, if discernible, must govern. But when the will does not answer the question, courts must resort to rules of construction.

A distinction is drawn between such a gift to one for life with remainder over, of a specific article, and a general gift of the estate, or of the residue, including such perishable or deteriorating articles. If the testator leaves a vehicle to a friend with provision that on the death of the first named friend it shall go to another, he clearly expects the first named legatee to use the gift freely. The remainderman can only claim what may chance to remain. But if, after special and general legacies, the will disposes of a residue, including with stocks and bonds also wine and hay, to one for life with remainder over, it would seem probable that the testator intended the wine and hay to be sold, and the proceeds added to the *corpus* of the estate. Such is the rule of construction.

Taking up the first case, the bequest of specific articles, the tenant for life is entitled to the possession and use of property so bequeathed as long as he lives, and if such possession or use wear out, damage, or wholly destroy the same, the remainderman is without remedy. Hence the specific bequest for life of such articles as *ipso usu consumuntur* (corn, hay, wine, provisions, etc.) constitutes an absolute gift to the tenant for life, although there be a limitation over, unless the first taker die before the property has been consumed or has perished. And where the specific gift is of articles which are not consumed by use, but only deteriorated or worn out (furniture, plate, farming utensils, etc.), the remainder is good, but the life tenant is entitled to the use and possession of the articles without giving security. But in such case, the remainderman is entitled to have an inventory filed of the goods, and if he show that there is real danger of wanton waste, or fraudulent secretion or removal of the property, a court of chancery will compel the life tenant to give security for the protection of the remainderman.

When the article is not consumed in the use, but merely de-

teriorates thereby (*e. g.*, implements of husbandry, household furniture) the life tenant is bound to keep it up; but he is not bound to increase it, the rule being that the tenant for life is entitled to the increment of personal property made during his tenancy, as compensation for the trouble and expense of taking care of the property. Hence the remainderman is entitled only to what remains of the original stock. The property is to be maintained and preserved as a whole, in as good condition as to productive capacity as when received; and while the life tenant is not responsible for deterioration occurring without his fault, he and his personal representatives are liable to the remainderman for any property converted to his own use; as to such property as is not consumed by its use, the life tenant is regarded in equity as a trustee for the remainderman.

It is well settled, according to the maxim, *Qui sentit commodum sentire debet et onus*, that the life tenant must pay all ordinary taxes, assessments, interest on encumbrances, and charges for ordinary repairs, out of the income.

When the bequest of the perishable article is not specific, but is contained in a general gift of the estate, or in a gift of the residue, the life tenant, as stated before in this section, does not have the use. The perishable property is converted into cash, or other permanent investment, and the life tenant receives the interest on the value from the death of the testator.¹

Gradually the meaning of perishable property has been enlarged, so as to include securities of a wasting nature, or any form of investment of an uncertain kind, or attended with risk.² In *Healey v. Tappan*,³ ships, whose period of best usefulness is of short duration, were ordered sold. At the time they produced an annual income of forty per cent on their cost.

§ 454. **Resort to General Estate when Annuity Fund fails.** — When the testator directs a definite sum to be paid to a person annually for life, and provides for setting aside a fund for the purpose, difficulties may arise if the fund, through subsequent events, proves inadequate for the annual payment for the income. Shall the deficiency in the annuity be made up by the

¹ The doctrine is established by *Howe v. Dartmouth*, 7 Ves. 137.

² *Buckingham v. Morrison*, 136 Ill. 437.

³ 45 N. H. 263, a leading case in this country.

general estate? These bequests of annuities must be distinguished from bequests of annual interest from a fund designated by the testator himself. No matter for what reason such fund or its interest fails, since it is the sole source of income fixed by the testator, the rest of the estate cannot be called on for the deficiency. But if the testator, without bequeathing any fund, leaves an annuity by will and directs the appropriation of a fund sufficient to yield an annuity of a certain sum, and subsequently such annuity falls below the sum named by reason of depreciated interest on the investment, the annuitant is entitled to have the deficiency made up from the residuary estate. When the estate for a number of years is insufficient to pay the annuity, but subsequently there is a surplus, if the language of the will will warrant it, the deficiency of the previous years may first be made up out of the surplus. But whether the principal of a fund, the income of which is set apart to pay an annuity, can be broken into to make good arrearages in such annuity, depends upon the intention of the testator as gathered from the whole will.

§ 455. **Profits as constituting Income for Life Tenant.** — During the life estate increases may accrue to which the life tenant has no claim. Thus appreciation in value of unproductive property is part of the *corpus* of the estate, and not of the income; but rents and royalties from coal leases are income, although the mines were not opened during the testator's lifetime, and payable, as such, to the legatee for life. Where a loss occurs in a trust for the benefit of one for life and another in remainder, because of insecurity of the particular investment, it is to be apportioned between them in the proportion which the principal sum lost bears to the interest due upon it at the time when the loss is determined.

§ 456. **Relative Rights of Life Tenants and Remaindermen to Dividends of Stock.** — It is self-evident that ordinary periodical dividends declared by a corporation as profits or earnings on its stock go to the shareholders of the stock at the time, and therefore to those legatees to whom the testator may have bequeathed the shares or the income, profit, or dividends thereof, for life. But great difficulty is experienced, in some cases, in determining whether a dividend declared represents earnings

in the proper sense, distributable among the shareholders without diminution of the capital stock, or whether it is but a new shape into which the capital stock is transformed, whereby no profits are distributed. There is much difference of opinion as to the relative rights of life tenants and remaindermen to extraordinary dividends, bonuses, or additional stock distributed among the stockholders. On the one hand, it is held that nothing is income from the stock of a corporation until the corporation itself has set it apart as income, and declared it to be payable as dividend. Without permitting inquiry as to source, courts holding this doctrine make stock dividends part of the *corpus* of the estate, and award dividends in money or property to the life tenant. Such is the holding in England and the Supreme Court of the United States.¹

Under what is called the Pennsylvania rule, on the other hand, an inquiry is made as to when the dividend, in whatever shape declared, was earned. So much of the dividend as was earned prior to the testator's death goes to the *corpus* of the estate; the balance is income, and goes to the life tenant.²

§ 457. **Interest on Legacies.** — Interest, in the sense in which the word is used in connection with the payment of legacies, is the compensation allowed by law for the deprivation of a legacy or distributive share beyond the period when it is payable according to the terms of a will or statute. As a general rule, therefore, interest is payable from the time when a legacy ought to be paid until the time when payment is made. This time is, as heretofore indicated, one year after the testator's death, unless a different time is fixed by the will, or by provision of the statute. Hence, general legacies bear interest from the expiration of one year after the testator's death.

Specific legacies do not come within the general rule, because, it is said, they are considered as separated from the general estate, and appropriated at the time of the testator's death. Hence, whatever produce accrues upon them from that time on belongs to the legatee, and, if there be successive legatees, each is entitled to the income during the time he is entitled to the corpus. Thus, where there is a specific legacy of

¹ *Gibbons v. Mahon*, 136 U. S. 549.

² *Earp's Appeal*, 28 Pa. St. 368, 374.

shares of stock, the dividends go to the legatee from the death of the testator; and where livestock, cows, mares, or ewes, etc., are bequeathed, the legatee is entitled to any increase between the death of the testator and the assent of the executor.

The general rule as to interest is held not to extend to legacies to a child by a parent, or one *in loco parentis*. Such legacies are held to carry interest from the testator's death, so as to constitute a provision for maintenance, whether so expressed by the testator or not, if no other provision is made by him for the support of the legatee. This exception is confined to infants.

A legacy given to a widow in lieu of dower has likewise been held to carry interest from the testator's death, if the testator has made no other provision for her support during the first year, though this is denied in England and in several States of this country.

The rule according to which interest is payable on general legacies is not affected by the condition of the estate, so that the executor have assets to meet it. Thus, where no time for payment is specified in the will, legacies bear interest from the end of the first year after the testator's death, although assets may not have come to the hands of the executor until long afterwards.

The rate of interest is generally that allowed by the State on ordinary contracts. No demand is necessary to entitle the legatee to interest.

§ 458. Interest when Time of Payment is fixed by the Will. — The rule giving interest on general legacies from one year after beginning of administration is based on the idea that they then become payable. When the testator directs the legacy to be paid at another time, the rule fails with its reason. The legacy bears interest from the time for payment; and it is immaterial, in this respect, whether the legacy is or is not a vested one. For although a legacy to one payable when he attains a certain age vests in the legatee upon the testator's death, yet he is not entitled to interest thereon until he has reached the appointed age; nor does his dying before that time entitle his personal representatives to claim the legacy, or interest on it, sooner than if the legatee had lived. So if a legacy is directed to be

paid, or invested, within a time named by the testator, it will not carry interest until the expiration of the period named.

But under the exception for infants mentioned in the preceding section the interest runs from death, even though the will provides a later period for payment.

Thus, an infant legatee, for whose maintenance no other provision is made, is entitled to interest on his legacy from a parent, or one standing *in loco parentis*, from the testator's death, although the legacy itself is not payable until he reaches a certain age.

Although the testator fix a given time for the legacy, his intention that interest thereon shall be payable from any other time must be carried into effect, if such intention is made apparent in the will. So, where the testator directs payment of a legacy when the legatee attains a certain age, *with interest*, such legacy will bear interest from the end of the year after the testator's death.

§ 459. Interest on Annuities. — A bequest of an income or annuity is payable from the testator's death, because his intention to provide a support for the legatee is otherwise not complied with, and bears interest where interest is payable thereon from the time when the first payment is due and is not made. But since the executor cannot be compelled to pay a general legacy within a year of the testator's death, so, it seems, no interest can be charged from any period within that time. It is said in England, that, generally speaking, courts of equity refuse interest on arrears of annuities given by will, unless the person charged with the annuity is obliged to seek relief in equity, when the court will require him to pay the arrears due with interest; but American courts incline to allow such interest, particularly where the annuity is charged upon land, or another legacy, and there is default in the payment.

§ 460. Persons Competent to receive Payment of Legacies. — It is a general rule that executors must see, at their peril, that they pay legacies to persons legally authorized to receive them. In the United States, payment may be made of an infant's legacy to his lawfully constituted guardian, or to one or more of his several guardians. Payment to the infant himself, or his parent, or other relative or person, is no protection against

the claim of the legatee on his attaining majority, or of a legally constituted guardian before the majority of the legatee; but while the payment should regularly be made to the guardian, yet in the absence of bad faith such disbursements as would have been approved had they been made by a guardian of the infant will be allowed to the administrator.

The interest on bequests by parents, or those *in loco parentis*, to infant legatees, is allowed to them from the death of the testator, and courts will, if they have no other means of support, decree its application for their maintenance. In cases of extreme urgency the court will allow maintenance for the infant out of the capital fund, even when inconsistent with the disposition made by the testator; but this is done only in extreme cases. Where there is some complication upon payment of a legacy to an infant, statutes of many States will be formed to give relief in various contingencies. But the subject cannot be elaborated here.¹

A married woman's power over her legacy, and consequently her right to receive it, discharging the executor, is practically governed in most States by statutes modifying or abolishing the husband's control of the wife's property. Apart from such statutes, if the legacy is to her separate use and benefit, the married woman can give the executor a good discharge in her own name. Otherwise the legacy must be paid to the husband.

On the presumption of death arising from seven year's unexplained absence, the representatives of the legatees may be paid; the court in such case usually requiring security from the presumptive legatees to refund in case of the legatee's return.

§ 461. **The Doctrine of Election**, in its application to questions arising under wills, grows out of the equitable principle which estops one who accepts a benefit under a deed or will from asserting a right inconsistent with its validity. If, therefore, a testator undertakes to dispose of property belonging to another, and devises to that other lands, or bequeaths personal property to that other, the latter will not be permitted to keep his own property and also enjoy the fruits of such devise or bequest, but must elect whether he will part with his own

¹ See Woerner on Administration, § 460.

estate and accept the provisions of the will, or keep his own property and reject that bequeathed.

To apply this doctrine, it must be clear that the testator actually intended to dispose of property belonging to another. The doubt arises most frequently when the testator has an interest with another in the property disposed of. If the will means only to dispose of the testator's interest, the necessary facts for an election are wanting; and courts will interpret the will as limited to the testator's interest unless the contrary is clear by direct statement or by necessary implication. But if the will is construed as disposing of the property of the other, there is a case for election, even though the testator's act was based on error in fact, and he was not aware that his will dealt with the property of others.

In case the donee elects to retain his own property, given to another by the will, the interest or fund that would have passed to the former will be applied to secure compensation to the disappointed parties, and the surplus remaining after making such compensation, if any remains, will be restored to the donee.

If a legatee die before he has had an opportunity of exercising his right of election, he will be presumed to take under the will, if its provisions are, as a whole, beneficial to him. It has been held, that, where there is a right of election in legatees to take the proceeds of property devised to be sold, or the property itself, a court of equity may elect for an infant legatee, if such appear to be for his interest and advantage; but this view has been criticised as permitting the court to make a will for the testator.

§ 462. **Payment of the Residue.** — After all debts, expenses of administration, and legacies have been discharged by the executor, or administrator with the will annexed, the residue of the personal estate is payable to the residuary legatee, if any has been named. The executor's right to the surplus, as it existed at common law, has been everywhere abolished, and the subtleties it involved may be left unnoticed.

The residue, as already mentioned, is that part of a testator's estate not otherwise disposed of; hence a general residuary bequest carries with it everything not in terms disposed of, and

with such exceptions as are pointed out in connection with the subject of lapsed and void legacies, everything not effectually or well disposed of, as well as lapsed legacies, unless a contrary intent clearly appear from the will. No particular form of words is necessary to constitute a residuary legatee; any expression is sufficient from which the testator's intention is discernible that the person designated shall take the surplus. Nor is it of controlling consequence that the clause is not the last of the disposing provisions, though such is the usual position.

It seems that the word "money" is often and popularly used as the equivalent of "property," and when given in a residuary clause is frequently construed by courts, both in England and America, to include the personal estate of the testator.

TITLE SEVEN.

OF THE APPLICATION OF THE ASSETS FOR THE PAYMENT OF DEBTS AND LEGACIES.

PART I.

OF THE LIABILITY OF REAL ESTATE FOR THE DEBTS OF DECEASED PERSONS.

CHAPTER L.

OF THE PROCEDURE IN OBTAINING THE ORDER OF SALE.

§ 463. **Nature of the Power to sell Real Estate for the Payment of Debts.**—It has been shown in an earlier chapter, that in most of the States the executor or administrator has no interest in, or title to, the real estate of his deceased testator or intestate, save a naked power to sell or lease the same, upon the order, generally, of the probate court, the exercise of which is conditioned upon an insufficiency of personal assets to pay the debts of the deceased. This power is purely statutory; each State prescribes the conditions and circumstances under which a sale of the real estate may be authorized, as well as the method of procedure in selling. It results from the peculiar nature of probate courts, that in some of the States the validity of the sales is made dependent upon a very rigid and literal compliance on the part of the courts, as well as of executors and administrators, with the statutory requirements; very slight deviations therefrom, or negligence on the part of the court or its officers in making the record entries, have been held sufficient to avoid the sale, even in collateral proceedings. The anxiety of courts to vindicate the validity of judicial sales should not be relied on as a pretext for the carelessness of exec-

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utors and administrators, or the supineness of probate courts, in the several steps necessary for the sale of real estate. Even if the sale should be held good as against a collateral attack, — and it is distressingly uncertain to what extent the trial, and even appellate, courts will go in that direction, — yet many acts of commission or omission which will not be allowed to invalidate the transaction in a collateral investigation may in a direct proceeding subject the administrator to serious liability, the estate to loss and delay, and all parties concerned to vexatious and oftentimes ruinous litigation.

The power to order the sale of real estate to enforce the payment of a decedent's debts, if the personal estate is insufficient, is ascribed to chancery courts, and is generally exercised by them upon the application of creditors, in those States in which such jurisdiction is not vested exclusively in probate courts.

Where the statute provides that application shall be made to the probate court, that court has usually exclusive jurisdiction. And in such case, if the real estate be situated without the county, yet the court of the county where the administration has been taken out is the proper court to make the order to sell.

§ 464. **Sale by Executor under Power in Will.** — Where the executor has power under the will to sell realty for the payment of debts, it is not necessary to make application to the probate court; and the executor's *bona fide* vendee under the power takes a good title which cannot be divested by a subsequent order of the probate court to sell for payment of debts under the statute.¹ But of course a power to sell for the sole benefit of devisees (*e. g.*, to sell and divide proceeds among devisees) must remain subject to the sale for creditors in the statutory method.

A creditor is not compelled to look to a devisee whose devise is charged with the payment of the debt; the administrator may, in such case, if the personalty is insufficient, obtain leave to sell the real estate.

§ 465. **Who may apply for the Order to sell Real Estate.** — Application to chancery courts to order the real estate of a deceased person to be sold for the payment of his debts is usually made by one or more of the creditors, the executor or adminis-

¹ Iowa Loan & Trust Co. *v.* Holderbaum, 86 Iowa 1.

trator and the devisees or heirs being made parties to the proceedings. But it is provided by statute in most of the States that the application shall be made by the executor or administrator to the probate court, whenever it appears that the personal assets are insufficient for the payment of the debts; and the power is in such case usually exclusively in the probate court. The application can be made by the administrator, or by any one interested in the estate.

§ 466. **Within what Time Application may be made.** — The necessity for a prompt and speedy settlement of the administration of the estates of deceased persons, in order that creditors may be satisfied and devisees and heirs be put in the indisputable possession of their inheritance as early as a just regard for the rights of creditors will permit, requires a limitation upon the time when either creditors or executors and administrators may apply for the subjection of real estate to the payment of debts. A few States have statutory regulations as to the time within which the application must be made; and for the protection of heirs, devisees, and their grantees under varying conditions.¹ But in most States Statutes of Limitation do not apply.

It is admitted by all the authorities, that in the absence of statutory regulation of the subject, it is the duty of courts to determine what shall be considered a reasonable time in this respect, and to refuse the application if the parties who demand it have been guilty of palpable *laches*.

In equity, under ordinary circumstances, the doctrine of *laches* can be invoked when the Statute of Limitations would bar an analogous proceeding at law. This principle is recognized in probably all States when application for sale of realty is made in probate court. There is a difference of view, however, as to the statute that should be applied. In one list of States the general Statute of Limitations furnishes the standard; in others it is the special Statute of Non-claim, fixing the time within which claims must be presented for allowance. It must be remembered that the refusal of the application rests on the exercise of the judge's equitable discretion, and that special circumstances can take the case out of the rule above

¹ See Woerner on Administration, § 465.

stated. The fact that the deceased owned realty may be discovered only after lapse of considerable time without negligence in administrator or creditors. The unexpected result of prolonged litigation may suddenly render the personalty inadequate for creditors. There are several cases in which the order has been granted after more than ten years, because the circumstances explained the delay and rebutted *laches*.

§ 467. **Notice of the Application to Heirs and Devisees.** — Since the executor or administrator does not, in most of the States, represent the devisee or heir in the matter of paying the debts of the deceased, holding for that purpose the personalty, which is the primary fund out of which they must be paid, he assumes a relation rather antagonistic to the heirs whenever he seeks to subject the real estate, which has descended not to him, but to them, to sale for the payment of debts. Hence, before there can be a valid order divesting them of their title by a sale for the payment of debts, they must have an opportunity to be heard, and to contest not only the necessity or propriety of the sale, but also the justice and validity of the debts for the payment of which the sale is demanded. There can be, therefore, no valid order, decree, or license for the sale of real estate to pay debts without notice to the parties interested, in some form, either by actual personal service or by publication. A sale without notice is void. Even where, as is held in many States, the proceeding is *in rem*, binding upon all parties claiming under the decedent without special notice to them, analogous to the doctrine applied in admiralty with respect to prize property, or in common-law courts to property seized under attachment, there must be notice, corresponding to the monition in admiralty, to all the world. The hearing must be at the time or term which is specified in the notice, whether given by actual service upon the parties, or by publication; if the application is not passed upon or continued at such time, the order, if granted at any other time, will be held void as being without notice.

The heirs, devisees, or any other person interested in the real estate to be affected by an order of sale, may appear on the trial or hearing of the application, and make themselves parties, if necessary, to oppose the order of sale, and, if un-

successful in the probate court, they may appeal from its decision.

In some of the States the appointment of a guardian *ad litem* is a necessary prerequisite to an order of sale of the real estate of minor heirs. Unless the statute requires the appointment of a guardian *ad litem*, the sale will be valid without, in direct as well as in collateral proceedings.

§ 468. **What the Petition must show.** — Upon the sufficiency of the petition the jurisdiction of the probate court most frequently depends. Unless it appear from its averments that debts which the decedent had contracted during his lifetime are still unpaid, and that there are not personal assets sufficient to discharge them, but real estate which is liable for their payment, the court will have no power to order or license such sale, and therefore any order so made, and any sale thereunder must be void or at least voidable. To this end there should be a schedule or detailed account of the personal property available, or that could be made available, for the payment of debts, filed with or made part of the petition; also a list of the debts due and remaining unpaid, and an inventory of the real estate.

In some States it is held that the petition is fatally defective if it omit a statement of the personal property and its value; while in other States a reference to the general inventory, or a statement that the decedent left no personal property, or that the personal property as appraised is not available, has been held sufficient, at least in collateral proceedings.

The debts or claims must, in most States, be first adjudicated, or established, before there can be a valid sale of real estate to satisfy the creditors, while in others this is not required, but may be proved subsequently.

The inventory of the real estate must also be made part of, or filed with, the petition; and that portion which is intended to be sold must be described with sufficient particularity to enable it to be identified.

The description in the petition is allowed, in some States, to be corrected from the papers in the case; while in others the amendment of the description of real estate is held to constitute a new petition, requiring proceedings *de novo*.

§ 469. **Proof of the Existence of Debts.** — The existence of the unpaid debts for which the sale of realty is asked, must be proved. The schedule of debts filed with the petition, even though sworn to, does not prove itself. The use of the formal allowances of the creditor's claims by the probate court as evidence on a hearing for sale of realty is not free from doubt. The administrator was the defendant at the hearing on these claims, and it is argued that the heirs or devisees as such were not parties to such a proceeding, and should not be bound by it. In Missouri and in North Carolina the devisees and heirs are held bound by the allowance as being in privity with the administrator; but generally the allowance is admitted as *prima facie* evidence only, subject to attack.

The debts so proved to exist must be such as were contracted by the deceased himself. No sale of real estate will be ordered to pay expenses of administration alone, or any debts incurred by the executor or administrator, after the death of the testator or intestate, except funeral expenses.

Where an executor or administrator has paid debts of the decedent in excess of the personal assets of the estate, he will be subrogated in equity to the rights of the creditors whose debts he has discharged.

There seems to be no objection on principle to the exercise of this power by probate courts, on behalf of the executor subrogated to creditors. The sale of real estate by order of probate courts, to reimburse administrators or executors who paid debts of the deceased out of their own means, in default of sufficient personal assets, has been held valid in several States; but it is unsafe, in States where this question has not been settled by judicial decision or statutory enactment, to rely upon the power of the probate court to order the sale of real estate, if it be necessary, before such order can legally be made, to exercise the equitable power of subrogation.

§ 470. **Proof of Insufficiency of the Personalty.** — The personal assets must be shown insufficient to pay debts at the time of the application. This condition may have existed ever since the grant of letters, or may have been occasioned by subsequent events. But in the latter case, if the deficiency was occasioned by any fault of the administrator it is held in most of the States

that all remedies, including proceedings on the administrator's bond, must be exhausted before an order for sale of realty will be granted.

Whether the land may be subjected to sale by creditors, where the personal assets have been squandered by the executor or administrator, and all remedies have been exhausted against him and his sureties without success, is not very clear, and has been held differently in different States. The weight of authority seems to authorize the sale of realty under such circumstances.¹

§ 471. Defence of Heir or Devisee to Application for Sale. — The heir or devisee defending against the application may of course introduce evidence on all matters necessary for obtaining the order. He may attack the creditors' claims, or show that they are barred by limitation; he may show that the administrator has other assets, or that the deficiency arises from the administrator's *devastavit*. But the validity of the appointment of the administrator cannot be questioned on such hearing; nor can the title of the deceased to the land proposed to be sold be passed on, nor any collateral questions of trespass, boundary, delay in settlements, etc. If it appear that the title is disputed, and that by reason thereof the sale would be made under disadvantageous circumstances, it is proper to stay proceedings until the title may be ascertained in a court of competent jurisdiction.

Furthermore, if the heirs, or any of them, will give bond for the payment of the debts, and to hold the administrator harmless, no order for the sale of land will be granted.

§ 472. What Interest of the Decedent in Lands may be ordered to be sold. — Any interest in land, whether legal or equitable, in possession or reversion, including inchoate equities, is liable for the debts of the owner, and may after his death be sold, if necessary to obtain the means of payment.

Pre-emption claims descend to the heirs, who take them as original parties freed from claims against the ancestor. Lands entered in the name of an original settler after his death are not liable for his debts, and a sale of them by an administrator, under order of the probate court, is void.

¹ See Woerner on Administration, § 470.

In some States an administrator will not be permitted to sell property held adversely by a third person; he must first recover possession. The reason of such a rule is held to be the impracticability of giving possession to the purchaser under such circumstances, and the consequent depression of the price which such a sale would bring.

Since the rights of creditors are paramount to those of heirs and devisees, the validity of sales by the personal representative for the payment of debts, within the time and under the requirements fixed by law, is not affected by any previous alienation by the heirs or devisees; the purchaser at such sale takes a title superior to that of the purchaser from them.

§ 473. Of the Bond and Oath required of Executors and Administrators. — Since the real estate is not assets available to the executor or administrator until it appears that the personal estate is insufficient to pay the debts of the deceased, it is held in some States that the conditions of the original administration bond do not include the proceeds of real estate, so that the sureties on such bond are not liable for the loss or misapplication of the funds arising out of the sale of lands. Hence a new bond, conditioned faithfully to administer the assets arising out of the sale of real estate, is held necessary, in some of the States, before there can be an order for the sale; and when required by statute, and neglected to be given, the sale is generally held void. In other States, where the statute does not require a new bond to be filed in contemplation of the sale of real estate, there is little doubt that the original administration bond, if conditioned faithfully to administer the estate, is sufficient to cover and protect the assets arising out of the sale.

For a similar reason, the executor or administrator is required, in some of the States, to take an oath before selling real estate upon the order of the probate court, and sales are sometimes held void where the administrator had omitted to take such oath. But long acquiescence by the heirs, and other circumstances tending to show the publicity and fairness of the sale, will raise a presumption from which it may be inferred that the oath has been taken.

§ 474. The Order, License, or Decree to sell. — The order, license, or decree to sell constitutes the warrant of power to

the executor or administrator to sell, without which, based on a proper petition, the sale is void, and should be certain and specific in its terms, accord with the petition, describe the land to be sold with sufficient accuracy for its identification, specify the place of sale, and prescribe the method, whether public or private, and terms thereof, as well as direct the manner of advertising.

It is irregular to order the whole of the real estate to be sold in gross, unless it appear that by the sale of a part the residue would be greatly injured, or that it would plainly be beneficial to heirs and creditors to sell the whole. A defective order of sale cannot be aided in equity. An order made subsequent to the sale is void.

If the proceedings have not resulted in a valid sale, the title to the real estate has not, of course, been affected, and the order of sale may be renewed; or, if before the sale is effected, some defect in the proceeding is discovered, for instance, that the description of the real estate in the petition or order is erroneous or incomplete, a new order may be based upon the amended petition or corrected proceeding. But where a valid sale produces an insufficient amount to pay all the debts, there must be a new proceeding based upon a new notice to the heirs; an order based upon the old petition, without new notice, for the sale of further real estate, is void.

CHAPTER LI.

OF THE SALE AND ITS CONSUMMATION.

§ 475. **Time of Selling.** — The executor or administrator selling under order of the probate court must strictly pursue the authority under which he acts. He has no discretion, except as to the mode of conducting the sale so as to secure the highest price, within the scope pointed out by the statute or order of sale.

The sale must be made at the time appointed by the court, or, if no time is mentioned in the order, within the statutory duration of the license, if any be provided. If the authority of the court under whose order the administrator is acting ceases, his authority ceases also, and his subsequent acts under such order are void.

But the removal of the administrator after the filing of a petition for the sale of lands to pay debts, or even after the order of sale, is no reason for dismissing the proceedings; they should be continued by the successor as soon as he is appointed and qualified.

§ 476. **Notice or Advertisement of the Sale.** — Provision is made in the statutes of the several States requiring publication of the time, place, and terms of the proposed sale, together with a description of the property offered. This is generally provided to be by posting notices at a number of public places in the county or vicinity, or by publication in a newspaper for a stated length of time before the day of sale, or by both these methods of giving notice. The statutory requirements as to publication must be strictly complied with or the sale is voidable. A publication in any other language than English in most States is bad. The publication must be continuous in the same newspaper for the whole time required by the statute, and where the publication was required to be daily, an interval of one day was held fatal.

Where the law or the order of court requires notice of the sale to be posted in public places, it must be shown in the return or report of sale that the places of posting were public places; a description of them is not sufficient. Publication made in accordance with the statutory provision, under an order erroneously directing advertisement in a different manner, was held to be in compliance with law. The notice must state the time and place of sale, or the sale will not be good. A sale will not be set aside because the description of the premises to be sold was not full if it did not mislead the bidders; and if the advertisement is sufficient to put a man of ordinary prudence on inquiry, and such an inquiry would readily disclose the true facts, a misdescription in the advertisement will not release the bidder from complying with his bid.

The day of sale must be set out with sufficient precision to enable those who may wish it to be present as bidders. A misstatement of the day, or the statement of an impossible day, will render the sale void.

It must be remembered, however, that in most States the judgments of probate courts are not open to collateral attack. The statement that sales on inadequate publication in cases above given are void, must be understood in the light of that doctrine. In a direct proceeding the error in advertisement can be shown by direct evidence. It can also be shown *by the record* in a collateral proceeding that the advertisement is fatally defective. But if the record shows that the court in its approval of the sale found that there was proper advertisement, evidence *dehors* the record will not be received to impeach the sale in a collateral proceeding.¹ But the distinction between advertisement of the sale and publication of a notice to bring in heirs or devisees to the hearing on the application must not be overlooked. The latter is jurisdictional, and error therein is open to collateral attack.

§ 477. **Appraisement required before the Sale.** — The statutes of nearly all of the States require the property to be sold to be first appraised — usually by three disinterested freeholders of the county in which the land lies — before it can be legally sold. Such appraisement is necessary to guide the discretion

¹ Robbins v. Boulware, 190 Mo. 33.

of the court in approving or disapproving the sale, and as a means of furnishing *prima facie* evidence of value in questions affecting the liability or *fides* of executors or administrators and purchasers. What has been heretofore said as to the appraisal of personal property is applicable, in a general way, to the functions and duties of the appraisers of real estate, subject of course to such modifications as may result from the statutory provisions regulating the subject.

The sale of real estate by an executor or administrator without first having had the same appraised is an irregularity which will cause it to be set aside in a direct proceeding for that purpose, and the purchaser cannot in such case be compelled to comply with the terms of sale. But in most States the sale is not on this account absolutely void in a collateral proceeding.

§ 478. **Conducting the Sale.**—In selling the real estate of a deceased person, the executor or administrator must act within the scope of his powers under the statute, and according to the directions contained in the order of sale. He is personally liable on his bond for the consequences of any deviation therefrom. Since he has no power to sell without order or decree of court, an agreement or bond made by him before obtaining such order to sell the land of the deceased is utterly void, incapable of being enforced at law or in equity. It is held to be against public policy to allow the administrator to place himself in a position where the exercise of his lawful authority would be influenced or controlled by previous contracts binding upon him. Such an agreement may, however, render the executor or administrator liable in damages to the person with whom he has contracted.

Inasmuch as the authority of the administrator is derived from the order of sale, he has no authority to change or vary the terms and conditions therein stated, and can sell only so much land as is specified or indicated therein; if he sell more, the sale is void at least as to the excess.

The statements and representations made by the administrator at the time of the sale bind the estate only as to such matters as are prescribed in the order, or concerning which he has discretionary power; hence, the estate is not, for instance, bound by his representations of the validity of the title. But

within the scope of his authority he may bind both the purchaser and the estate, by statements publicly made in connection with the sale, or by agreement with the purchaser. Thus he may agree to pay off a mortgage constituting an encumbrance upon the land offered for sale, and such agreement is binding if not in violation of the terms of the order or statute, but is void otherwise. In the absence of statutory authority to the contrary the sale must be conducted by the executor or administrator in person. The court can appoint neither the sheriff, nor the creditor, nor any person but the executor or administrator, to do so. It would seem that, as a general rule, in analogy with the doctrine denying to a trustee the power to delegate his discretionary authority, the administrator cannot authorize an agent or attorney in fact to make the sale. But a few of the older cases sustain sales by agents. The adjournment of a sale may be announced by an attorney in the absence of the administrator, and the sale made upon the day to which it was adjourned is not thereby invalidated. The act is non-discretionary, and clearly can be delegated.

It is held in some States, that if, from the extremity of the weather or other unavoidable cause, there be no bidders present, or if the competition be so low that the property would not bring above one-half its value, it is the duty of the administrator to adjourn the sale to some future day; and a sale on such adjourned day, if the adjournment was *bona fide*, will be sustained.

§ 479. **Report and Confirmation of the Sale.** — To enable the probate court to examine into the doings of the administrator in respect of the sale of real estate, and to determine whether he has complied with all the requirements of the statute and of the order of the court touching the same, it is the duty of the executor or administrator to report to the court what he has done in the premises. Until confirmed, the sale is incomplete, and no title, either legal or equitable, passes to the purchaser. The confirmation or approval of the sale by the court is the judicial ascertainment of its validity and legality, and the decree so made cannot thereafter, in any collateral proceeding, be questioned, except in the few States in which the judgments of probate courts are collaterally assailable. Upon the confirma-

tion the purchaser is entitled to a deed and therefore to the rent; he is bound to pay the purchase-money, and assumes the hazard of accidental destruction of the property.

Where several tracts or parcels of ground have been sold and are returned in one report, the sale may be confirmed as to one or more parcels or tracts, and vacated as to others.

On the report of sale it is the duty of the court to inquire into the circumstances connected with the transaction, examining the administrator, purchaser, or other witnesses, if necessary, and to exercise a judicial discretion as to approval of the sale. On the report the heirs, devisees, or other parties interested in the realty are entitled to be heard, and in addition to attacking all that occurred subsequent to the order of sale, may show that such order should not have been granted on grounds mentioned in § 471, *ante*.

It is on this ground that a court of equity will decline to vacate a sale approved by the probate court, in the absence of proof that the probate decree is inequitable, and that the party complaining could not have availed himself of it in the probate court.

Mere inadequacy of the price obtained is not sufficient to authorize a refusal to confirm the sale, unless the court be satisfied that upon a resale a better price will be secured. The reasonable probability of realizing an advance of ten per cent upon the amount reported as bid has been held to justify an order for a new sale.

The power to review or set aside a judgment or decree confirming a sale after the expiration of the term at which it was rendered does not, in the absence of statutory enactment to that effect, reside in probate courts.

Equity will set aside such sales and the judgments whereon they are based on the same grounds and under the same limitations which apply to setting aside the judgments of other courts of record.

§ 480. **Payment of the Purchase-Money.** — It is the duty of the administrator to collect the purchase-money for the land sold before making a deed to the purchaser, at least so much of it as was, by the terms of sale, to be paid in cash. Neither heir nor legatee as purchaser can retain any part of the purchase

price on the score of what may be ultimately coming to them out of the estate. The same is true of a creditor purchasing: he cannot retain out of the purchase-money a sum equal to his demand against the estate, because all creditors have an interest in the estate, and the share to which each is entitled must be first determined by the court. Yet an administrator may agree with a creditor, that if he become the purchaser his claim may be deducted from the purchase-money to the extent of the dividend to which it may be entitled; but such agreement must be clearly proved and entered into in perfect good faith, or it will not constitute a defence in an action for the purchase-money.

If the purchaser fail to pay the price bid by him, the administrator should resell the property; but it seems wise, if not absolutely necessary, that he should report the fact of non-payment, and obtain an order of court to resell. The court does not lose its jurisdiction to order a resale, even after confirmation, until a sale has actually been consummated. Such an order to resell is conclusive upon the former purchaser, if he have notice that a motion to that effect will be made. The purchaser refusing to comply with the terms of the sale may be compelled to do so; or he may be held liable for any difference between his bid and any lower price which may be realized on the second sale. But the administrator must proceed to resell within a reasonable time; if he delay, his right to recover for the difference will be lost, unless the delay is caused by the request or agreement of the bidder.

If payment of the purchase-money, or any part of it, be deferred by the terms of the sale, it is the administrator's duty to obtain security therefor, in default of which he becomes personally liable for the amount due. If the security which he takes turns out to be worthless, he is *prima facie* liable; and if he takes security by reason whereof the vendor's lien is waived, he becomes personally liable, whether the security he took was originally good or not.

§ 481. **The Deed of Conveyance.** — Statutes authorizing the sale of decedents' lands for the payment of their debts contemplate, and can contemplate, nothing more than the transfer, by means of such sale, of the interest or estate of the decedent

to the purchaser. Executors and administrators are the agents or instruments of the law to accomplish this purpose. The legitimate office of the words of conveyance in an executor's or administrator's deed is to effect this object, and must be construed with an eye thereto. Nowhere is the principle, that general words of a releasor or grantor are to be restrained to the occasion, more fully applicable than to such deeds. So far as covenants and words of warranty in an administrator's deed are fairly referable to their official capacity or duty, their effect is limited to the estate alone, and they in no manner affect the personal right or liability of the administrator. Thus, where a widow, administratrix, in executing specifically articles of sale by her deceased husband, under order of the Orphan's Court, conveyed all her husband's estate and her own since his death, in law and equity she was held not barred of her dower, which was the only personal interest she had in the land. Her interest conveyed was limited to her official interest as executrix.

But the executor or administrator may bind himself by an express and voluntary covenant collateral with his official act; and where he chooses to add to the ordinary obligations of an administrator's deed a personal covenant of his own, the better to insure the conveyance, he will be held personally to respond to the full scope of the covenant. Such a covenant is not within the scope of his official duty or authority, which he cannot change by any act of his own; hence the estate in such case is not bound, but only himself personally.

The deed of an executor or administrator should show upon its face the authority under which it was given, with sufficient certainty to enable the act done to be traced to the authority vested in him; for such a deed conveys no title unless executed pursuant to the decree or order of some court of competent jurisdiction. It is not essential, though certainly advisable, that all the steps in the proceeding prior to the execution of the deed should be therein recited. Their omission does not vitiate the deed; and erroneous recitals may be corrected by the record. Deeds have been held sufficient, not reciting the authority by which given, but referring to the same, and the administrator describing himself as such; even though the signature was

individual without reference to official authority, when the capacity in which he acted appeared in some part of the deed.

An administrator's sale passes no title until a deed is executed and delivered; but where the sale is otherwise complete, equity will compel the delivery of a deed and the payment of the purchase-money, or the probate court may compel its execution in conformity with a sale made under its order, and duly confirmed. Delay in the delivery of the deed beyond the time specified in the terms of sale, in consequence of objection made to the confirmation of the sale, does not release the purchaser, and when made and delivered, it relates back to the confirmation of the sale, and confers the same title as if it had been executed immediately.

CHAPTER LII.

OF THE CONSEQUENCES ATTENDING THE SALE.

§ 482. **Application of the Proceeds.**— In England, and in those of the American States in which the English doctrine has not been modified by statute, real estate devised to be sold for the payment of debts, and money raised by the sale of property so devised, are equitable assets, differing from legal assets in being applicable to the payment of debts without regard to their dignity or grade. But the general doctrine in America is, even in equity, that all assets coming to the executor or administrator by virtue of his office, are legal assets, to be disposed of in the course of administration, in the manner pointed out by statute. Hence the proceeds of the sale of real estate, if necessary for the payment of debts, are distributable, like personal property, under order of the probate court.

By the sale the real estate is converted into money. But the conversion is complete and effectual only to the extent and for the purposes for which the sale was authorized, whether by the will, or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect in fact or in law, the property retains its former character in respect of the rights of its owner, and passes accordingly. The surplus of the proceeds of a sale ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion. This principle applies as fully to sales by the executor under the will, as to sales under order of the probate court. But such surplus goes *as money* nevertheless, and therefore when the heir or devisee dies before such surplus is paid to him passes to his personal representative even though the land may not have been sold during his lifetime.

The purchaser at an unauthorized sale by the executor will, if the proceeds were applied to the payment of debts of the estate, be subrogated to the rights of the original creditors, who were paid off with the proceeds of the sale. This equity for the purchaser cannot, of course, be allowed to affect the rights of such persons as did not share in the proceeds.

The creditor of an heir may reach the proceeds of the sale of real estate due to him, in chancery.

The expenses of a sale of real estate ought to be paid out of the proceeds.

§ 483. **Purchaser's Liability for Encumbrances.** — It is evident that the purchaser at an administrator's sale can acquire only that interest in the property sold which the deceased owned at the time of his death. The rights of others, holding by a title superior or equal to that of the deceased debtor, cannot be affected by the proceedings in the probate court. It follows that, without some statutory provision or special order of the court to the contrary, the purchaser takes at the administrator's sale subject to all liens, mortgages, dower interests, claims to homestead, or titles of whatever nature which are superior to the title of the deceased debtor.

Such a sale, where the purchaser takes the title of the deceased subject to claims which may be unascertained in amount, or even dependent on contingencies beyond calculation, must be unfavorable for the estate. It is nevertheless the only course under the statutes of many States.

In these States, if the administrator is compelled to pay off the mortgage debt out of the general assets of the estate obtained by a sale of the equity, he will have a clear equity against the purchaser for reimbursement, and this, too, out of the land itself. But in others it is made optional with probate courts to order the property to be sold subject to existing liens, or for the discharge of liens. If land is sold by order of the probate court which is bound by the lien of a judgment or attachment, the holder of the lien, if the estate be insolvent, is entitled to have it first satisfied out of the proceeds of the sale, if the purchaser takes it free from the liens, as he must if the lien is transferred to the proceeds.

Taxes due to the State or to municipal corporations consti-

tute an encumbrance which, in the absence of statutory provision, or direction contained in the order of sale to the contrary, the purchaser must pay. But taxes accruing while the real estate is in the possession of the heirs are payable by them, because they are entitled to the rents; and such as accrue on real estate which goes to the executor or administrator are payable by him, and the purchaser has the right to have them discharged out of the purchase money.

§ 484. **Purchaser's Liability to Dowress and Homestead Tenants.**

— The widow's dower being a right beyond the control of the husband during his lifetime, is equally out of the reach of his executors, administrators, and creditors. Hence, a sale of real property is, in nearly all the States, always subject to the widow's dower, unless the widow, by her voluntary act, join in the sale and convey her dower interest in the land, in which case she is entitled to the value of her dower out of the proceeds of the sale, free from the claim of any set-off which the purchaser may have against her. The value of such dower may be ascertained by computing the value of the annuity to which she will be entitled for the duration of her life, according to the mortality tables. The widow, like any other person *sui juris*, may, by her representations inducing a purchaser to buy, estop herself from claiming dower in the land bought by him. Where she sells as administratrix under order of the court, without reserving her dower or excepting it in the deed of conveyance, it is not affected by such sale.

Lands assigned to a widow as her dower may be sold for the payment of debts, subject to her life tenancy as dowress, and upon her death the title and right of possession vest in the purchaser. The sale of land under a mortgage, jointly executed by the deceased husband and his wife, she having relinquished her dower, conveys a title to the purchaser free of dower; but the widow has her right of dower in the surplus, if any, after discharging the mortgage.

The rights of the widow and children in the homestead cannot be touched by general creditors. The validity of liens against the homestead, including those for purchase price, as well as the liability of the homestead for debts of the deceased contracted prior to its acquisition have been discussed *ante*,

§ 104; so also the liability of the interest of the heirs or devisees after the expiration of the homestead right to sale for debts of the ancestor.

§ 485. How Purchasers are affected by the Rule of Caveat Emptor.

—The sale of real estate by an executor or administrator, whether under a power conferred upon him by will, or by order of the probate court for the payment of debts, is strictly governed by the extent of the power. What he does in conformity with the will, or with the order of the court, in so far as the same is authorized by statute, is binding upon the estate, the heirs, and devisees; what he does in excess of such power or order is either void, or can bind him only personally. The principle of *caveat emptor* is, therefore, strictly applicable. The administrator is not, in general, bound, in selling the property of an estate, to make known defects of title within his knowledge. Nor can the purchaser defend against an action at law for the purchase-money, on the ground of an irregularity in the sale, nor if, in the absence of fraud or warranty by the administrator, he was dispossessed by the holder of a paramount title of which he had notice, actual or constructive, at the time of sale.

But although the rule of *caveat emptor* requires the purchaser to inform himself as to all the facts which he can ascertain by the exercise of reasonable diligence, it does not charge him with notice of that which cannot be learned from an inspection of the records. Secret defects are to him no defects at all. So the purchaser's title has priority over an unrecorded deed from the intestate.

The purchaser is charged with notice of the record in the case, but this means only the record of the proceedings for the sale. The purchaser can rely, for instance, on the finding in the order that there are unpaid debts, though other entries in the record unconnected with the application for sale, showed the debts paid.¹

§ 486. The Purchaser's Rights in Equity. — *Caveat Emptor* is the rule at law. In equity the purchaser will be protected against the consequences of having been misled by the fraud or mistake of the executor or administrator in so far as he had a right to rely on his representations. Thus, where the executor

¹ McNally v. Haynes, 59 Tex. 583.

sold under a will which gave him no power to do so, received the purchase-money, and with the knowledge and consent of the heirs, who informed the purchaser that the executor was the proper person to sell, conveyed by deed, the heirs were estopped from disputing the purchaser's title.¹

Where the administrator solemnly admits of record, that the personal property is sufficient for the payment of all of the debts of an estate, and officially consents to a sale of the land in a partition suit, neither he nor the heirs will be permitted to question the validity of such sale; and if the personalty prove insufficient to pay the debts, the heirs will be liable for the value of the land, each for his share.

But the mere consent of the administrator to the sale by the heirs, not officially given under authority to do so, cannot deprive the creditors of the right to subject the land to the payment of their claims.

It is well recognized by authorities, and obvious on principle, that an irregular sale may be confirmed by adult heirs, who will not thereafter be permitted to question the purchaser's title. Where the sale is void, the purchaser, upon surrendering the property to the heirs, has an equity to recover of them such of his expenditures as have benefited them. This includes the value of improvements put upon the land in good faith, and taxes paid by him. Of the purchase money he receives only so much as is shown to have benefited the heirs. Payments of creditors of the estate, where the personalty is inadequate, relieve the heirs; but the purchaser cannot recover from the heirs so much of the purchase-money as was not used to pay debts.

The situation may be reversed; the heirs, instead of the purchaser, may seek to set aside an administrator's sale of realty.

An administrator's sale cannot be avoided by the heirs on proof that he procured the license by fraud or misrepresentation, unless the purchaser at the sale participated in or had notice of the fraud; and if the purchaser, although he acted in collusion with the administrator, sell to an innocent third party, the latter, buying for value and in good faith, takes an unimpeachable title.

¹ *Farrill v. Roberts*, 50 N. Y. 222.

By the sale under order of the probate court, the purchaser acquires whatever title or estate the deceased owned at the time of his death, and he may enforce conveyance thereof to himself by action against the administrator.

§ 487. **Executors and Administrators as Purchasers.** — The rule that the purchase of an executor or administrator at his own sale may be avoided at the option of the beneficial owner, stated *ante*, § 326, applies whether the property purchased be realty or personalty. The doctrine is said to stand “upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity.”¹ “However innocent the purchase may be in the given case, *it is poisonous in its consequences*. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. . . . It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale.”²

The rule is applied to meet the danger it contemplates. The administrator must not become interested in the property between the sale and its confirmation. He cannot buy through an agent in any guise, nor can he act as agent for another; attorneys of executors or administrators cannot be permitted to buy at sales by their clients, nor a probate judge at a sale ordered by himself.

The rule covers all cases where the executor or administrator controls the sale. It thus applies to sales under foreclosure of mortgages given to the executor or administrator as representing the estate, and to judicial sales on judgments obtained against others for the estate. But where the sale is not under his control he is free to bid. A sale on foreclosure of a mortgage on realty, given by the deceased, is an instance. The administrator is not trustee for heirs or devisees. He owes them no duty. So also an executor's purchase of the interest of a legatee, or an administrator's of a distributee, does not fall under the

¹ *Michoud v. Girod*, 4 How. (U. S.) 503, 555.

² Chancellor Kent in *Devone v. Fanning*, 2 Johns. Ch. 252, 260.

rule. But in these cases, while the trustee is not interdicted from dealing with the beneficiary, and therefore the transaction is not voidable at the discretion of the beneficiary, another doctrine, in the nature of a rule of evidence, imposes on the purchasing personal representative, in an action by the beneficiary to set aside the transaction for fraud, the burden of proving his good faith in the transaction.

A few courts have held the purchase by the personal representative at his own sale under the rule above given absolutely void; while the strong current of authorities holds such purchase only voidable and that the legal title passes to the purchaser, subject to be divested by the heirs or devisees within a reasonable time, and he is liable to them as a trustee. What is a reasonable time within which the application to set aside such sale may be made, depends upon the circumstances of each case. Courts of equity will refuse relief in cases of *laches* or unreasonable delay by the heirs, in analogy with the Statute of Limitations.

An executor or administrator, having purchased at his own sale, is treated in equity as a trustee for the heirs or devisees; hence, if such sale is set aside on their suit, he will be entitled to account, being chargeable for rents and profits received from the property, or, if converted into money, then for the money, with interest, and to be credited with payments for the purchase, if applied in the administration of the estate, for taxes, necessary repairs, and reasonable improvements, also with interest.

§ 488. **Validity of the Sale in Collateral Actions.** — To what extent and in what States the judgments of probate courts are conclusive, and unassailable except by direct proceeding, and where they are impeachable collaterally, has been fully discussed in connection with the subject of probate courts in America. The question most frequently arises in connection with the sale of real estate by order of the probate court.

A few States, the number steadily diminishing, adhere to the old rule that all the essential facts must affirmatively appear on the face of the proceedings to make the sale valid. But under the ruling of almost all States, probate courts, like other courts of record, are presumed to have adjudged every question neces-

sary to justify the judgment; and their orders cannot be collaterally reviewed, save as lack of jurisdiction is concerned.

Still, occasional exceptions, based on the older idea, can be met with even now in some States that have generally adopted the modern doctrine; and no irregular sale under order of probate court should be pronounced good without consulting the rulings in the State concerned.

PART II.

OF THE RELATIVE LIABILITY OF ASSETS TO CREDITORS AND LEGATEES.

CHAPTER LIII.

OF MARSHALLING ASSETS FOR THE PAYMENT OF DEBTS AND LEGACIES.

§ 489. **Order of the Application of Funds Liable to the Payment of Debts.** — The debts of the deceased must be paid in full before the directions of the will can be carried out. It is a matter of frequent occurrence that the testator's estate is not large enough, after satisfaction of all the debts to meet all the testator's dispositions for his beneficiaries. Some beneficiaries must lose in order that the superior claims of creditors may be satisfied. There must be abatement somewhere in the legacies or devises. Where shall this abatement fall? This rests on the question: where did the testator intend it to fall? When that is clear by the terms of the will, there is no difficulty. But wills ordinarily are not drawn with the idea that the assets will be inadequate to satisfy its provisions; and so a system of interpretations has grown up under the decisions.

To appreciate the rulings discussed in this and succeeding sections, and the reasoning on which they rest, certain principles mentioned heretofore, must be constantly kept in mind:

1. Personal property is the primary fund for payment of debts.
2. Real estate at common law is liable only for specialties, and not for general debts of the deceased.
3. Modern statutes everywhere have made the real estate of the deceased liable for his general debts, but that liability is only secondary, the personality under the statutory system still remaining the primary fund for the payment of debts.
4. Under common law the testator could make his estate, including realty, chargeable for his debts

in any way he chose; and that is true, *a fortiori*, in later days. With these considerations in view, the courts in arriving at the testator's presumed intention, give these general rules as to the liability of the estate for debts:

I. It is a rule universally admitted, that the personal estate is the natural primary fund for the payment of debts contracted by the deceased himself, which will be first applied until exhausted, unless the testator expressly or by implication direct otherwise. Such rule of course does not affect the creditor who has a right against other property of the deceased; *e. g.*, a mortgage on his realty. Such creditor can enforce his rights. The way the principle is enforced through subrogation appears later.

II. Lands expressly or specially devised and set apart for the payment of debts are resorted to primarily, if the testator, in charging such lands, intended thereby to exonerate the personalty; but unless such shall be found to be his intention, the direction to sell or mortgage real estate to pay debts amounts only to an expression of the testator's honest desire to have his debts paid in the manner pointed out by law, leaving the personalty as the fund to be first resorted to, and the real estate auxiliary thereto, in the event that the personalty shall prove insufficient.

III. Next in the order of liability for debts are lands descended to the heir, whether acquired before or after the making of the will.

Here is recognition of the rule that realty is only liable after personalty is exhausted; while, on the other hand, it is held that land of which the testator made no disposition should go to creditors, before the dispositions of the testator, even as to personalty, should be disappointed.

IV. Estate devised or bequeathed, subject to a charge for debts.

This must be distinguished from II. In that case the testator expressly devotes the land primarily to the payment of his debts; as when he directs it sold for that purpose. But under IV. it inferentially appears that the testator intended that rather than have his other gifts, even of personalty, nullified, he would have the land sold. Thus where the will disposing of

all the testator's estate, real and personal, was bad as to the realty, but good as to the personalty, the heir of course took the realty. Creditors, as was their right and indeed their only course, collected out of the personalty. It was held that the testator intended the legatees to have the personalty unencumbered by debts; that the testator had inferentially charged the debts on his realty; and so the legatees were entitled to recover from the heirs what had gone out of the personal estate to pay creditors.¹

V. Next come general legacies, which abate *pro rata*.

VI. Specific legacies, and devises whether in terms specific or residuary, which also abate *pro rata*.

The last two propositions are discussed *ante*, § 449.

The application of these rules to special situations appears in the following sections.

§ 490. **Charge of Debts on Real Estate.** — Prior to the statutes which everywhere subjected realty to ultimate liability for all debts, it was obviously of great importance to determine whether the debt of a testator had been charged upon his real estate, since in the absence of sufficient personalty the payment thereof could not otherwise be coerced. In the anxiety of courts of equity to secure justice to creditors, they have endeavored to give effect to general directions by a testator for the payment of all his debts, by construing such a direction into a trust for their discharge out of his real estate in case of deficiency of the personalty. Very slight words in the will were held to imply a charge of debts upon lands, and it was established as a general rule, that a direction by a testator that his debts shall be paid charges them by implication on his real estate, either as against his heir at law or devisee.

Since all land now is subject to creditor's claims, it is no longer necessary in aid of justice to resort to such strained interpretations, and little remains of the old rules on the subject beyond the cardinal doctrine, that the intention of the testator inferable from the words of the will must be carried into effect.

§ 491. **Charge of Legacies on Real Estate.** — The testator may make legacies, as well as his debts, a charge on realty. If the language of the will indicates that the testator intended legacies

¹ *Hope v. Wilkinson*, 14 Lea 21, 27.

to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appear that in giving the legacies he had the real estate in mind, they will constitute a charge thereon, although it be devised. The land is accordingly considered to be charged with legacies, when the devise is upon condition that the devisee pay the legacies; or where the duty to pay an annuity is imposed upon the devisee in the same sentence devising the land; or where he is to "make up the deficiency." In all such cases the devised land is liable to the legatees, and may be followed though the devise has lapsed or the land has descended to the devisees' heirs, or the devisees have aliened it to others.

But the lands are not charged by a mere direction of the testator to the devisee to pay a legacy; it must appear from the will that it was his intention to onerate the land, otherwise the direction is merely personal, and must be held to charge the person, if he accept the devise. The intention to charge the land may be manifested by express words, or by implication or fair inference from the context; and the extraneous circumstances under which the will was written may be considered in aid of its terms. It is held that where the payment of a legacy is made a condition of the devise, its acceptance creates, in addition to the liability of the land devised, a personal liability to the legatee, which may be enforced without resorting to the land, the lien still remaining as a security. In some States it is held, that in such case the land cannot be pursued until the personal remedy is exhausted; in others, that he may pursue the one or other remedy first.

§ 492. Effect of Devise of Rents and Profits. — The devise of the rents and profits or of the income of land is construed generally as a devise of the land itself. But this is merely a rule of construction and must yield where another intent can be gathered from the whole will. The gift of interest, or income, of personalty, in like manner, as a general rule, carries with it the fund itself, and is governed by analogous principles.

It has been a matter of contention whether a direction or power to raise money out of the rents and profits of the testator's lands authorizes their sale or mortgage. The true doctrine seems to turn upon the principle contained in the rules of con-

struction, according to which the general intent of the testator, discernible from the whole of the will, must dominate the particular provisions whenever there is an irreconcilable inconsistency between them, or an impossibility to give complete effect to both.

§ 493. **Exoneration of the Personality.** — It has already been stated, that a general charge of debts upon the real estate is not, without more, sufficient to exonerate the personality. No express words are necessary for that purpose. "It may now be taken as the established law, that the personal fund will be exempted if the intention of the testator in its favor can be collected from a sound interpretation put upon the whole will."¹

A general charge of the debts upon the real estate amounts to an exoneration of the personal estate specifically bequeathed, until the land so charged is exhausted; but a general legacy will not be protected.

§ 494. **Exoneration of Mortgaged Property.** — When the testator devises real estate which is subject to a mortgage given by the testator, the mortgagee has his uncontrolled choice to collect his claim either as a debt owing by the testator from his general assets, or else to enforce his mortgage against the land of the devisee. But as between the devisee and the estate of the deceased, who ultimately pays? The testator may indicate the fund out of which the mortgage shall be paid, or devise the land *cum onere*; otherwise the general estate is liable, for the debt is the personal debt of the testator. If the mortgage creditor compels the devisee to pay, the latter comes in with his claim against the general assets. When the exoneration of the devisee requires abatement of legacies, it has been held that the devisee cannot call upon specific legacies to abate, and in some States not even general legacies, though in most he can.

Up to the point involving legacies, the mortgagee can enforce his claim against the various funds of the estate in the following order: first, the general personal estate; next, lands devised for the express purpose of paying debts; then, lands descended; and, lastly, lands devised charged with debts; and if the charge fell upon the last of these classes, the devisee himself, who calls

¹ Brant's Will, 40 Mo. 266, 279.

for the exoneration, would be liable to contribute ratably with the other devisees.

If the mortgagee collects his debt from the general assets, the proper primary fund for payment of the debt has been used, and there can be no equity against the devisee, unless legacies have been compelled to abate. When a specific legatee is deprived of his legacy by the payment of a debt secured by mortgage, he will be subrogated to the right of the creditor against the land, to the extent of his legacy, or to the value of the personal estate, primarily liable, not so appropriated.

The question whether the devised property or the testator's estate is primarily liable for the mortgage debt as between themselves, can only arise if the testator was personally liable on the mortgage. If therefore B devises to C property which B bought of A subject to a mortgage given by A, for which B is not personally liable, the devisee, C, necessarily takes the property *cum onere*.

The right of a legatee to whom any specific chattel has been bequeathed to have it exonerated from encumbrance thereon is the same as that of a devisee. Personal property pawned by the testator is to be redeemed by the executor in favor of the specific legatee.

§ 495. **Statutory Modifications of the Rule as to Devise of Encumbered Property.** — The presumption that in devising mortgaged property the testator intended to exonerate it, giving the devisee the unencumbered fee, unless something in the will indicated the contrary, is reversed in England by the statute known as Locke King's Act,¹ under which the presumption is that the devisee takes *cum onere*, unless the will discloses the contrary. A New York statute is to the same effect.

In some of the States it is provided that the encumbrance of any land devised shall not be deemed a revocation of the devise, but the devisee shall take the same subject to the encumbrance. These words, on first impression, might seem to imply that the onus of discharging the encumbrance is thereby thrown upon the land. No adjudications of the point have come to the knowledge of the editors; but a number of considerations suggest that the legislature meant simply to abrogate

¹ 17 and 18 Vict. c. 113.

the rule existing at common law, whereby an encumbrance of lands previously devised worked a revocation of such devise.¹

§ 496. **Marshalling Assets in the Course of Administration.** — Under the old English system the adjustment of the conflicting rights between creditors, legatees of different kinds, devisees, and heirs could only be accomplished in a court of equity. We have seen that the ecclesiastical courts, the predecessors of our probate courts, were inadequate to the task; and, indeed, had no jurisdiction.

The powers of our modern probate courts to administer the law under these equitable principles may be doubted as to one or the other mode of exercising such authority in some of the States which have not wholly cut loose from the old system. However, since the distribution of assets is now everywhere under control of probate courts, and that distribution can only be accomplished by application of these principles, the power of probate courts to act on equitable principles in distribution is generally recognized.

§ 497. **Marshalling Assets among Creditors, Legatees, Devisees, Heirs, and Distributees.** — The situations calling for application of the equitable principles mentioned in this chapter present endless variety. In general the doctrine of marshalling applies where one having a paramount claim enforces it against a fund only secondarily liable therefor, or liable only *pro rata*, whereupon the injured beneficiary may require adjustment, in one of the equitable methods, from the party primarily liable to the paramount obligation, or *pro rata* liable, as the case may be.²

¹ Statutes in other States, slightly changing the rule, and other statutes bearing on the subject of contribution are discussed in Woerner on Administration, § 497.

² For details, see Woerner, § 496.

TITLE EIGHT.

OF ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

CHAPTER LIV.

OF THE COMMON LAW AND STATUTORY SYSTEM OF ACCOUNTING.

§ 498. **Accounting under the Older System of Administration.** — Under the system existing prior to the modern American theory of probate courts, the ecclesiastical tribunals could compel the executors or administrators not only to file an inventory, but also to render an account at the instance of interested parties. But no witnesses could be heard to falsify the inventory or account, and the court had no power to order payment of a debt, or entertain a suit by legatee or distributee. The only practical result seems to have been to give interested parties an insight into the estate; and this could be better attained in equity.

At common law, as we have seen, each creditor's suit required an independent full accounting by the executor or administrator for all assets, involving trouble, expenditure, and possible inconsistency in the decisions.

The most usual course to compel executors and administrators to account, under the English law, is by bill in equity. They are regarded, in most respects, as trustees, and as such are held liable by courts of equity to set forth an account of their assets and of the application of them, notwithstanding an account before taken and distribution ordered in the spiritual court. Before the statute on this subject, it was usual for one or more creditors to file a bill, commonly called a creditors' bill, in behalf of themselves and all other creditors who should come in under the decree, for an account of the assets and a due settle-

ment of the estate. Thus the estate could be settled, and the executor or administrator exonerated. The assumption of such jurisdiction by equity is not generally adopted in this country. Under the modern statutory system, providing as far as may be for settlement of all such matters in probate court, some special equitable ground should be shown to exist, involving the impotence of the probate court to meet the situation to give jurisdiction to a court of chancery.

§ 499. **Statutes requiring Periodical Accounting.** — In the American States the general course of legislation has been to compel accounting in the probate courts as a matter of statutory requirement, without waiting for creditors or distributees to apply for an order to that effect. To this end, executors and administrators are required to present an account of their administration at a given time, generally upon expiration of one year after appointment, or at the term commencing next after the expiration of such year. The presentation of these accounts is everywhere enforced by penalties against the executor or administrator for default, which vary in the different States.¹

The liability to account is not, however, limited to the periodical returns required by the statutes, but the probate court may, *sua sponte*, or on motion of any person interested in the estate, require such accounting at any time.

§ 500. **Rendering the Account and Passing upon it.** — Upon the *rendering* of the account by the executor or administrator, thus enforced in nearly all the States, it is open to objections by parties interested therein, who may allege and show that the accountant has not charged himself with all the assets belonging to the estate, and dispute the truth or validity of payments for which he takes credit. It is the province of the probate court to pass upon the account, determining judicially what assets the executor or administrator is chargeable with, and to what credits he is entitled; and it results from this authority that the decision of any question upon which there was an issue between the parties becomes an adjudication thereof, which cannot be impeached except in a direct proceeding by appeal or for fraud. Such finality can only attach to a settlement of the account, which is the judgment of the court, judicially determining —

¹ See Woerner on Administration, § 501.

settling — the questions involved. The mere *rendering* of the account, even though followed by *ex parte* judicial approval, which falls short of a judgment, cannot have that effect.

§ 501. **Exclusive and Concurrent Jurisdiction over Administration Accounts.** — A distinction between annual or other periodical accountings and final settlements is very important. Final settlements are everywhere made on notice to all parties interested; while the States vary much as to the notification for partial settlements. In many, if not most, States, there is no provision for notification as to these partial settlements. But no settlement should be binding on a party not notified or appearing. For it is apparent that parties who were present, or had actual or legal notice to be present, at the settlement of the administration account, and made no objection thereto, or whose objections were heard and adjudicated by the court having jurisdiction, ought not again to be heard to object; while it would be unjust and unreasonable to conclude a party interested who was not present, and had no notice to be present at the settlement, and therefore had no opportunity to be heard.

The legal effect of the settlements is also influenced to some extent by the nature of the jurisdiction conferred upon probate courts in different States. They have exclusive original jurisdiction over the settlement of administration accounts in one list of States. In another their jurisdiction is held to be concurrent with that of chancery courts.¹

However, in the first list of States it must be remembered that courts of equity will afford relief in all cases where the powers of probate courts are inadequate to accomplish justice, being regarded, in this respect, like ordinary courts of law, and that hence accounting by executors and administrators may be enforced by courts of equity, although the original jurisdiction be vested exclusively in probate courts. And, on the other hand, a court of equity will not arrest proceedings commenced in a court of probate, although their jurisdiction be concurrent, unless some fact is shown which renders the court of probate inadequate to a full settlement. It is obvious that the conclusiveness of the settlements in probate courts is largely influ-

¹ See Woerner on Administration, § 503.

enced by this difference in the power of courts over executors and administrators.

§ 502. **Conclusiveness of Partial Settlements.** — Where the proper parties are before the court having exclusive jurisdiction, pursuant to notice given in accordance with the statute, and on a partial settlement contest the validity thereof, a judgment rendered thereon is as conclusive as if rendered on final settlement, and is a bar, as to the matters determined by such judgment, to all inquiry at the final settlement. Under the statutes of a few States partial settlements not appealed from are conclusive. But most States do not provide for notice of these partial settlements; and generally, the effect of periodical or partial settlement is that of *prima facie* validity; they are liable to be rebutted, falsified, or surcharged, and mistakes may be corrected and omissions supplied at any subsequent periodical or final accounting.

§ 503. **Nature of Final Settlements.** — Final settlements of the administration, when made by the executor or administrator in pursuance of statutory requirement, after legal notice to all parties interested in the estate, are conclusive as to all matters therein directly adjudicated. Where the notice has been given as required by the statute, the judgment will be conclusive, although rendered in the absence of all parties but the administrator.

The conclusive character of such settlements is the necessary result of the judicial nature of the proceeding. *Res judicata pro veritate accipitur*: hence it would be unreasonable and unlawful to allow that to be again questioned which a court of competent jurisdiction has once decided.

Parties *sui juris* who appear at the hearing waive any defect in the notice, and are bound.

If, however, the parties interested in the estate have not been notified in the manner required by statute, nor appeared to the settlement, they are obviously not bound by it: as to them the determination of the court constitutes no judgment. The form of notification prescribed by the statute for the case must be strictly observed to make the settlement binding on such as do not voluntarily appear.

So where infant distributees are entitled to be represented,

and no legally qualified guardian appears for them at a final settlement, they are not bound by such a settlement unless a guardian *ad litem* be appointed for them. But the fact that a probate decree is voidable as to an infant does not entitle any other party to invoke such infancy to protect them against the effect of the decree; nor can the executor or administrator be heard to assail the validity of a final settlement on the ground that due notice had not been given, nor that it was made before the time fixed by statute.

§ 504. **Conclusiveness of Final Settlements.** — It seems a self-evident proposition, that the judgment or decree of the probate court on the final settlement by an executor or administrator is conclusive only upon the matters therein embraced: that which has not been tried cannot be said to be adjudicated. Nor is such decree or judgment conclusive of matters collaterally recited, but not directly adjudicated. It is important, therefore, that the executor or administrator should, for his own protection, include in his account every item which constitutes an element in the settlement. Where partial settlements are held conclusive, they too of course cannot bind as to matters not adjudicated in the account.

§ 505. **Setting aside Final Settlements in the Probate Court.** — There has been occasion heretofore to remark that judgments of probate courts, within the scope of their authority, are as conclusive as those of courts of general jurisdiction; hence they cannot, after the term at which they were rendered, be opened, revised, or amended in any particular without statutory authority, except in equity for fraud, or by appeal.

Judgments on final settlements fall under the rule. But in a number of States the statutes confer upon probate courts the power, under the circumstances and in the manner therein pointed out, to reopen and review their judgments on final settlements. In others, the equity powers possessed by probate courts are held to authorize them to set aside or reopen their decrees on final settlement, for the purpose of correcting mistakes or relieving against fraud.

§ 506. **Setting aside Final Settlements in Chancery.** — In dealing with the judgments and decrees of probate courts upon the final settlements of executors and administrators precisely

as with the judgments of other courts, the party seeking relief in equity must show himself to be free from fraud or negligence. If the question brought before the court of equity by bill to open and correct a final settlement passed on by the probate court was there presented and adjudicated, either directly or by necessary implication, and the party complaining had an opportunity to be heard, and to have the error corrected by appeal, the failure to do so constitutes such *laches* as will prevent redress in equity.

CHAPTER LV.

OF THE DEBIT SIDE OF THE ACCOUNT.

§ 507. **What the Account must show.** — A proper statement of the account on its debit side involves a distinction — 1. between the personal property as inventoried, charging it at its appraised value, or according to the face or inventoried amount; 2. the gain, if any, by the sale of the inventoried property above its appraised value; 3. the gain, if any, by the conversion or sale of bonds, stocks, mortgages, etc., above the inventoried amount thereof; 4. any property which may have been discovered as belonging to the estate, or received after the making of the inventory, or which may be scheduled in a supplementary inventory; 5. any interest collected on choses in action which interest is not contained in the inventory; 6. any interest received or profits realized upon loans or investments made by the administrator; 7. any interest which may be due from the administrator himself; 8. the income, if any, from the rent of real estate; 9. the proceeds of the sale of the real estate; 10. any accretion to the estate from any source whatever. And each individual transaction should be accurately noted.

The credit side should distinguish, — 1. between the expenses of probate and of administration; 2. the allowance to the widow or minor children as fixed by statute or directed by the court, referring to the order of court, if any; 3. the loss, if any, arising out of the sale of the inventoried property below its appraised value; 4. the loss, if any, arising by the conversion or sale of bonds, stocks, mortgages, etc., below their inventoried amount; 5. the loss, if any, by reason of uncollectible debts, compromises with debtors, diminution of debts due the estate by set-offs proved, etc.; 6. debts paid according to their priority; 7. interest which may be allowable for advances; 8. compensation of the executor or administrator.

In addition to this, the account should set forth the exact

condition of the balance remaining, showing to what extent the assets consist of ready money, and the degree of availability of such as do not; and also a full schedule of demands proved or allowed against the estate, showing their rank and the rate of interest they bear, as well as of all demands of which the administrator has been notified, and which have not yet been proved or allowed, or which may be pending on appeal or suit in court.

§ 508. **Inventoried Assets to be charged in the Account.** — The inventory is the foundation of the account, and should constitute the first item of charge against the executor or administrator. If any of the property has been sold or converted into money at the exact price or amount stated to be its value in the inventory, it need not again figure in the account, because the executor is already charged therewith in the item representing the inventory; but for any excess obtained above the amount at which the property is inventoried, he must charge himself. And so he must charge himself with any property or money coming to him in his capacity as executor or administrator, if the same has not been inventoried.

§ 509. **What Interest Administrators are Chargeable with.** — The administrator or executor is not merely chargeable with interest called for by his inventory items (*e. g.*, an interest-bearing note); but is also expected to invest funds in his hands, and to account for the interest. If he negligently permits funds of the estate to lie idle, instead of applying them to the payment of debts or other liabilities of the estate, or, where that cannot be done, investing them safely and so as to yield interest for the estate, he is liable to be charged with interest at the usual legal rate, or at such rate as he might by reasonable skill and diligence have obtained, commencing from the time when the payment ought to have been made. Hence he is not liable if he is bound to retain the funds to meet payments demandable at a time which cannot be ascertained beforehand.

Where an executor or administrator pays an unauthorized demand against the estate, or a legacy or distributive share under circumstances leading to a rejection of such payment, he is accountable for simple interest thereon. So upon any funds which he has misapplied, or lost by an unauthorized investment.

But where the administrator or executor is guilty of a deliberate breach of duty the rule is more stringent. If he mingle the funds of the estate with his own, whether he has used them or not, and *a fortiori* if he has employed them in his own business, or for his own purposes, he may be chargeable with interest thereon at the highest legal rate compounded for the whole of the time during which they were thus used or mingled. This compounding of interest is in some States viewed as a penalty; in others it is said to be adopted "for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee."¹ Under the latter view the offending executor or administrator could perhaps be permitted to prove his actual profits as less than those the application of the rule would impose.

§ 510. **Debts of Executor or Administrator to be charged.** — The executor or administrator must charge himself with any debt he owes the deceased. In some States he is conclusively liable; in others he can show his own insolvency as he can that of any other debtor of the estate. The subject is discussed *ante*, § 299.

The executor or administrator is not bound to charge himself with a debt for which he is only contingently liable, nor at common law with a debt owing, not to the deceased, but to his former representative.

That an executor or administrator is entitled to show that a claim of the testator or intestate against him is unjust, or has been paid or discharged, seems self-evident, and has been held in several cases. So, also, that the Statute of Limitation may be invoked by him, but does not run in his favor during his term of office.

§ 511. **Rents and Proceeds of Real Estate Chargeable to the Executor or Administrator.** — It may be laid down as a universal rule, that whenever an executor or administrator comes into the possession of real estate by virtue of his office, whether by force of statute, by order of the court, or under the terms of a will, he must charge himself with all rents, profits, and proceeds of sale arising therefrom. But if he collects rents or receives proceeds of sale, not in the exercise of his official functions, yet under color of his office, — that is, if he assumes control of the

¹ *Cruce v. Cruce*, 81 Mo. 676, 686.

real estate as executor or administrator when not authorized by statute, order of court, or direction in the will, — he is clearly liable to those whose rights he has usurped. It is not always easy to determine whether, in such case, he is liable in his official capacity, so that the rents, profits, or proceeds of the real estate constitute an element of his administration account, or to the heirs or devisees directly; in which case the remedy of the latter would not be in the probate court, nor the transaction be brought into the official account.

Clearly creditors of the estate cannot hold rents wrongfully collected by the administrator as assets of the estate to the detriment of heirs; nor does it lie in the mouth of the administrator when sued personally by the heirs to claim that he is liable to account in probate court. Nor when the heirs elect to hold him in his representative capacity with consent of all parties interested, should the administrator be allowed to defend on the ground that the liability is personal. But when the heirs seek to hold the administrator in his representative capacity to the detriment of others interested in the estate, or to hold the bond of the administrator, it becomes necessary to decide whether the administrator is liable in his representative capacity for rents collected without authority. On principle, it would seem to follow from the administrator's liability to the heirs or devisees directly, as a wrong-doer or trespasser, or as their agent or trustee, *dehors* his official status, that he is not liable in his official capacity, and therefore not chargeable in his administration account with the profits, rents, or proceeds of sale of real estate; and it is accordingly held in many cases that the probate court has no jurisdiction to try the liability of the executor or administrator in respect of real estate not legally in his charge, and that the sureties of the administrator are not bound for the funds so collected. But the contrary result is reached in several States, holding that the heirs have the right to proceed against the executor in his official capacity. The conclusion in some cases rests on statute.

CHAPTER LVI.

OF THE CREDIT SIDE OF THE ACCOUNT.

§ 512. **What the Accountant may take Credit for.** — Expenses of administration are necessarily entitled to payment before the debts of the deceased, because they are incurred for the very purpose of securing the payment of the debts; hence the administrator is entitled to credit, whether the estate is sufficient to pay all debts or not, for all outlays to pay funeral expenses, taxes assessed against property in his charge, expenses in recovering the estate, costs accrued in defending the estate against the claims made thereto by others, or expenditures in preserving the estate.

Unless the statute in terms so provides, an administrator or executor will not be entitled to charge the estate with money which he paid a surety corporation or trust company for becoming surety on his bond.

There is some diversity in the allowance of some of the expenses connected with the administration, arising partly out of the different methods of making compensation to the executor or administrator. Generally travelling expenses, office rent, and clerk hire, when necessary for proper administration, are allowed; and also the compensation of an agent for the performance of services requiring appliances or a degree of skill not within command of ordinary persons.

§ 513. **What Counsel Fees will be allowed.** — Reasonable fees for legal services, paid in good faith, are proper items of credit in the administration account, and will be allowed for legal assistance in resisting claims against the estate which the administrator does not know to be just and lawful, or in assisting him in discharging his official duties, such as settling the estate in equity when necessary, collecting the assets if a suit be necessary, preparing the account, or defending the settlement.

The rule is, that the administrator can be allowed credit only

for counsel fees which he has actually paid, and no more than is a reasonable compensation for the services rendered to the estate, no matter what the administrator has actually paid or contracted to pay; and the onus to prove the necessity and value of such services is on the administrator. Compensation for legal services rendered by the executor or administrator in person is not usually allowed, unless it be extra compensation as is provided for by statute in some States. Hence he cannot claim credit for legal services rendered to the estate by a law firm of which he is a member.

The administrator's right to credit for either counsel fees or costs does not depend upon the favorable issue of the litigation, but only upon good faith and prudence in prosecuting or defending.

§ 514. **What Counsel Fees will not be allowed.** — An administrator will not be allowed credit for counsel fees when they were occasioned by his own fault, neglect, or gross ignorance. This principle involves that the administrator cannot be allowed the costs and counsel fees incurred in resisting proper charges against him, or in defending against a suit brought against him to recover or secure the trust fund, if the complainant was justifiable in bringing such suit, or for services rendered in defence of the personal interest of the administrator. It is obvious, too, that the estate cannot be held liable for the costs or counsel fees arising out of litigation between the beneficiaries thereof among themselves, or in the protection of the interests of particular persons, for such expense is properly chargeable to the interest or persons specially benefited.

It frequently happens that counsel fees are charged in gross for legal advice and services in a contest on final settlement, in which exceptions taken are in part sustained and in part overruled. It would be unjust to deny the administrator credit for fees paid in defence of his account when unjustly assailed; and equally unjust to impose upon the estate the cost of defending erroneous or improper charges by the administrator. The administrator will be allowed such sum as is applicable for the successful defence, and is personally liable for the rest.

§ 515. **Costs in Litigation Incident to Administration.** — When the executor or administrator sues on a demand which accrued

to the deceased, or which originated with him though since matured (*e. g.*, a note given to the deceased, falling due after his death) unsuccessful litigation results in a judgment for costs against the assets of the estate; the administrator is not personally liable. But when the cause of action originated subsequent to the testator's death (*e. g.*, a trespass on property of the deceased in the administrator's possession), it is held, unless statutes have changed the rule, that the judgment for costs against the unsuccessful administrator should be *de bonis propriis*, and not *de bonis intestatis* (or *testatoris*). This proposition only deals with the liability as between the parties to the litigation.

But the right of the administrator to take credit in his settlements for costs he has paid, whether with his own means or out of the estate rests on other considerations. It may be stated, as a general rule of law, and one always applied in equity, unless restrained by some statutory provision, that an administrator or executor, having acted in good faith and with ordinary prudence, is entitled to be credited in his administration account for all costs he may have been compelled to pay in litigation affecting the estate in his charge. And his right to credit therefor does not depend upon the favorable issue of the litigation, but only upon good faith in prosecuting or defending. But if he sues without reasonable cause, or for the purpose of vexing or harassing the defendant, he will be held personally liable for costs in the probate accounting.

Since executors and administrators usually give bond for faithful administration, and to answer for all damages or liabilities touching their official acts as such, they are not required to give bonds for costs, or on appeal.

§ 516. **The Executor's Expenses in Litigation concerning Establishment of the Will.** — Whether the executor is entitled to credit for the expenses incurred in the litigation to establish a will depends upon circumstances in several directions. In so far as he simply performs a duty, the expenses fairly incurred by him in a contest with the heirs at law are payable out of the estate, whatever be the consequences to the successful contestants; but if he voluntarily assume the burden of a contest which properly belongs to the legatees or devisees, he must look to

them, and not to the estate for reimbursement. So it has been held, that it is not the duty of an administrator to contest the probate of a will, and that counsel fees paid by him in such contest cannot be charged against the estate; nor, of course, are such expenses incurred by third parties chargeable to the estate, although under agreement to that effect by one who was subsequently appointed administrator. But he is justified in defending a probate once allowed.

§ 517. Disbursements in Respect of the Real Estate. — The executor or administrator is bound, whenever he is lawfully in charge of real estate of the decedent, to exercise the same diligence and prudence in its preservation and protection as if it were personal property in his hands. Hence they should be allowed credit for all disbursements, made prudently and in good faith, for necessary repairs, maintenance, and discharge of incumbrances. As to taxes, the administrator pays not only those which accrued while he was in charge of the estate; but, even when not, he should pay such taxes as were assessed against the deceased and due in his lifetime, constituting a lien at the time of his death, and a liability of the estate, and this although such claim be not probated against the estate.

When the realty is not in charge of the administrator, he cannot obtain credit for disbursements made on account thereof.

§ 518. The Allowance for Support of Widow and Children. — The statutory allowance for support of widow and children, discussed (*ante*, §§ 79-96) in some States goes to them directly, so that the administrator does not inventory it and has nothing to do with it. Where the property is turned over to widow or children by the administrator, it comes out of inventoried property, and he, of course, is entitled to credit. Where it is not set apart by the court or by appraisers, the administrator must show that the amount given was reasonable and proper.

§ 519. Advance Payments to Distributees. — If an administrator pays the right parties their proper shares, or a part thereof, he is protected, whether it is done under sanction of court or not, or before or after the passing of an account.

Advances properly so made by the administrator or executor should, on final accounting, be credited to the personal representative against the shares of the respective legatees or dis-

tributees. But advances to minors can be allowed only when made for necessities. All other advances to minors can be charged neither against them, nor against the estate. It is very evident, however, that such payment to legatees or distributees, without an order of the court, cannot affect the rights of creditors or other distributees or legatees. The personal representative assumes the risk that such advances are not in excess of the proper share; and no amount of good faith excuses him as against creditors and other interested parties.

§ 520. **Disbursements in Payment of Debts.** — The allowance or judgment in favor of a creditor is conclusive as to the validity of the debt (unless it can be set aside as fraudulently procured by the administrator or with his aid, as elsewhere discussed); but whether the executor or administrator is entitled to credit for its payment depends upon the further question of the sufficiency of assets, and if he has paid such debt or allowance in advance of an order to that effect, he has done so at the risk of having so much disallowed as may be in excess of the dividend to which the creditor is found to be entitled. Hence no credit can be allowed in such case until the amount to which the creditor is entitled has been ascertained. If the estate be solvent and the debt undisputed, or sufficient proof is offered thereon at the time of the accounting, the administrator is generally entitled to credit for the amount paid, no matter when he paid it; and conversely, if the administrator, even in a State which allows the payment of debts of deceased persons without previous adjudication, pay a debt without sufficient proof of its validity, he is not protected by such payment. In some States credit is allowed for proved up claims only; in such States credit will not be allowed in the administration account for the payment of claims not so proved up.

At common law it seems an administrator or executor cannot recover an overpayment from the creditor. In most jurisdictions it is now held that he can recover a payment made under mistake; though some courts deny relief when the mistake was as to a matter of law as distinguished from a matter of fact.

§ 521. **Payments at Discount, or in Depreciated Currency.** — An executor or administrator cannot make any profit to himself by speculating with trust funds, and if he compromise claims

or pay off the debts at a discount, or procure an assignment of such to himself or to the estate, he is entitled to credit for such amount only as he shall have actually paid out. So if he pay in a depreciated currency, he can only receive credit for such value of such currency as he stands charged with, and not for the amount of the debt in money of higher value; or if he pay a debt of the estate in property of his own of less value than the amount of such debt, he can obtain credit only for the value of his property.

§ 522. **Credits for Difference between Inventoried and Actual Values.**—The personal representative is *prima facie* charged with the values in his inventory and appraisement. He is entitled to credit for the difference between the amount with which he stands charged and the amount actually realized. The onus is on the administrator who asks credit for the amount of uncollected debts, to prove that they are uncollectible.

In like manner the administrator is entitled to credit for all property with which he is improperly charged in the inventory, or which has been lost without fault on his part, or consumed in the administration.

§ 523. **Interest on Advancements by the Executor or Administrator.**—The condition of estates is sometimes such as not only to authorize, but strongly commend, the advancement of money, where debts, perhaps bearing heavy interest, are to be paid, and the immediate reduction of the real or personal property into ready cash to meet such payments might be attended with serious loss. If under such circumstances the administrator will borrow or advance the money necessary to relieve the estate, both justice and policy require that he should have credit for customary interest thereon.

CHAPTER LVII.

COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 524. **Commissions allowed by Statute and in the Absence of Statutes.** — At common law, executors and administrators are entitled to no compensation for their personal trouble and loss of time in the discharge of their duties, either at law or in equity. But now almost every State makes statutory provision for the compensation of executors and administrators.

Like other expenses of administration, compensation to the executor or administrator is payable before debts, legacies, or distributive shares; and it has been held that the policy of the law and the interest of estates demand this compensation to be exempt from attachment by their creditors; and the same ground forbids the assignability of his commissions before they are ascertained and liquidated in the manner authorized by law.

In most States the statutes provide fixed rules, making the determination of the compensation a matter of mathematical calculation.¹ In those few of the American States in whose statutes no provision for the compensation of executors and administrators is found, the courts usually allow, as a matter of justice and policy, such compensation as may be considered reasonable, varying in amount according to the time, trouble, and responsibility involved, as well as the magnitude of the estate administered, — usually five per cent on personal and two and a half on real estate.

§ 525. **Compensation in Cases of Maladministration.** — It is held in numerous cases that compensation must be refused if the administrator has been guilty of wilful default or gross negligence in the management of the estate, whereby the same has suffered loss. This principle is adhered to in some of the States

¹ An abstract of the various statutes can be found in Woerner on Administration, § 524.

in which the compensation is fixed by statute, denying any discretion in the matter to the courts on the ground that the statute gives compensation for faithful administration only.

The questions arising from maladministration are apt to be accompanied by insolvency of the administrator, and the practical issue is often as to the extent of the liability of the sureties on the administrator's bond. The loss resulting from the administrator's dereliction the sureties must make good *in toto*. Should the sureties be penalized in a further sum through refusing them allowance for commissions for services properly rendered? It would seem fair that to the extent to which the estate has been properly administered, and on the amount which either he or his sureties pay to make up for the losses by *devastavit* or maladministration, the administrator should be allowed such commissions as the statute provides.

§ 526. **Upon what Property Commissions are Allowable.** — The statutes usually measure the compensation of the personal representative by a percentage on the property administered. Manifestly this excludes property belonging to strangers, though it was inventoried, and the property allowed the family absolutely, whenever it goes to the family directly without intervention of the personal representative.

A safe and convenient rule in this respect, so far as it goes, is that commissions are allowable to the administrator on such property, and such property only, as constitutes assets in his hands; *i. e.*, such property as passes from the deceased to creditors, heirs, devisees, distributees, or legatees through his custody. The rule excludes commissions on advancements, all uncollectible debts, and property lost or perished.

It is held in one or two States, however, that commissions are not allowable on property delivered in kind to the distributee, nor on a specific legacy turned over to the legatee, nor on a debt due to the testator and specifically bequeathed to the executrix. The general rule, however, is otherwise. "On general principles," says Woodbury, J., in *West v. Smith*,¹ "it would seem just and proper for all such courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies the

¹ 8 How. (U. S.) 402, 411.

trouble and risk are as great, if not greater, than in money legacies, and it would be difficult to find elementary principles to justify commissions in one case, and withhold them in the other."

§ 527. **Compensation for Extra Services.** — The statutes of a number of States allow extra compensation to executors and administrators for the rendition of services to the estate outside of the scope of their ordinary duties. Unless such extra compensation is within the language or spirit of the statute, it cannot be allowed, because at common law their personal services are wholly gratuitous.

Keeping accounts or collecting rents, for instance, are matters for which the personal representative may ordinarily employ help, for which he claims credit in his settlements; but if he does such work himself, he cannot, in the absence of such statutes, claim extra compensation. The usual services for which extra compensation is claimed are those rendered as attorney at law, as manager of some special business (*e. g.*, a plantation), or as expert accountant. But extra compensation is exceptional, and rests on statute.

§ 528. **Compensation of Joint Executors or Administrators.** — It is obvious that, if an estate is administered on by more than one person, all the persons so administering will, jointly, be entitled to no greater compensation than one administering alone would be entitled to. In some of the States there is no power in probate courts to apportion the commissions among several executors or administrators according to the amount or value of their respective services; but in other States, where one has performed more than his share of the work, the court may allow him a proportionate share of the commissions. Where the probate court has no jurisdiction to divide commissions, it has been held that equity might decree the division.¹

Agreements amounting to a trading in the appointment of an administrator, or for the transfer of the right to administration for a consideration are considered as trafficking for office, and are void as being against public policy. But an agreement between executors or administrators as to their respective shares of the commission does not fall under the inhibition,

¹ See Woerner on Administration, § 530.

and, indeed, there are cases holding that an administrator, appointed with the consent of others equally entitled to administer, is bound by his agreement or promise not to charge commission.¹

§ 529. **Compensation to Successive Administrators.** — Where one of several executors or administrators dies pending administration, the commissions earned up to the period of such death must be divided on the principles laid down in the foregoing section. The survivors would get the commissions subsequently accruing. The question arising in this case as to what portions of the commissions are attributed to the period prior to such death is the same which is presented in the case of administration *de bonis non*.

Where there is administration *de bonis non*, only one commission should come out of the estate. In some States probate courts have power to apportion the compensation fixed by law for the whole, according to sound judgment; the second administrator being entitled to commissions for the whole administration, less what the first administrator is entitled to. Where this power does not exist, injustice is often done the first administrator's estate, since commissions are frequently, if not usually, only earned when property is fully administered, which implies its proper final disbursement.

This difficulty is greatly reduced in those States in which part of the commissions are allowed for taking the estate into possession, and part for disbursing the same. A convenient measure is thus afforded for the apportionment of compensation among several successive administrators, which cannot work great injustice.

§ 530. **Bequest to Executor as bearing on his Right to Commission.** — A bequest to an executor, unless there is language in the will indicating that it was intended for specific compensation for the services, does not deprive him of the right to charge commissions. But when it appears that the legacy was given in lieu of commissions, or where it imposes on the executor the condition that he shall not have commissions, the current of authority is that the executor or court cannot defeat the provisions of the will. No case for election is presented. But in a

¹ Bate v. Bate, 11 Bush 639.

number of States the executor is required by statute to renounce any provision made in the will to compensate him for his services, or forfeit his right to compensation under the statute.

§ 531. **Commissions where the same Person is Executor and Trustee.** — Where by the terms of a will the functions of an executor and of a testamentary trustee coexist in the same person, it is sometimes difficult to determine whether such person is entitled to compensation for administering property in both capacities, or whether, as it is usually expressed, he is entitled to double commissions. On principle, it seems that where the same person is called on to perform two distinct acts, for each of which the law awards compensation, he should receive such compensation for both, that is, double commissions, because the compensation is not awarded as a bounty or gratuity, but as the equivalent for services rendered, and it is therefore indifferent whether they were performed by the same or by different persons. This principle is generally recognized, even where double commissions are denied. But the functions of an executor and of a trustee may be so interwoven and blended that they are inseparable, and when so, as must be the case whenever the trust is annexed to the office of executor, the act must be deemed to be that of the executor alone, and double commissions are not allowable. The intention of the testator must be decisive, in many cases, of the question whether an executor and trustee is entitled to double commissions.

§ 532. **Credit for Commissions in the Administration Account.** — Experience demonstrates that the safest and most convenient course, both for the accountant and the beneficiaries of the estate, is to take credit on each settlement or accounting, whether partial or final, for commissions on so much of the whole estate as has been administered, whether disbursed for expenses of administration, in the payment of debts, or in distribution or payment of legacies, and on which commissions are allowable by law. On the final settlement of the account, commissions should be allowed on the whole of the balance in the administrator's hands subject to be disposed of by the order of the court, and deducted from such balance. This system is inexact in allowing commissions on commissions in the final settlement.

If, for instance, the commission is five per cent and the final fund one thousand dollars, this system allows the administrator \$50, whereas he should only receive five one hundred and fifths of \$1000, or \$47.62. In practice, however, the exact calculation is very rarely made.

CHAPTER LVIII.

OF THE METHOD AND PROCEDURE IN ADJUDICATING THE ACCOUNT.

§ 533. **Devastavit.** — At common law, *devastavit*, or *devastaverunt*, is the name of a writ given to any person who has been injured in his rights in consequence of the misapplication or waste of the assets or property of an estate by one or more executors or administrators, whereby he or they have made themselves liable to answer for the damages out of their own estate.

This machinery for making the administrator personally liable is long obsolete; but the term has been retained, and is used in America as a convenient designation for such acts of the executor or administrator as render him liable to the estate out of his own means, and has no other significance; and where such liability is found according to the principles of law applicable, the effect of the common-law remedy of *devastavit* is accomplished by the falsification or surcharge of his account.

§ 534. **Accounting by Co-executors or Co-administrators.** — The principles governing the accounting by several joint executors or administrators are inferable from what has been stated in connection with the subject of their respective rights and liabilities. As a general rule, where they keep separate accounts, each charging himself with so much of the estate only as comes into his own hands, neither is chargeable with the assets in the hands of the other; and in such case their separate accounts cannot be combined in making the order of distribution. So either of them may discharge himself by showing proper administration of all that came into his own hands; but on a joint accounting they are jointly liable for all assets received by any of them. So two executors who have given a joint bond with sureties are jointly liable to creditors and distributees for the defalcation of either, before the sureties; but in equity the executor actually receiving the assets is *primarily* liable, if his co-executor had no means of knowing him to be insolvent, and did not join in the misapplication.

§ 535. **Accounting by Successive Administrators.** — Under the common law view any change in an asset by the administrator constituted technical administration. The administrator *de bonis non* could require of his predecessor or his personal representative only the property technically not administered, and was responsible only for such to parties interested in the estate. For property which was no longer in specie, that is, for such as had been technically administered, creditors and other parties in interest had to look to the prior administrator or his estate. Under the American system, there is no complete administration on any one asset until it has been disbursed for proper purposes. The administrator *de bonis non* must settle with the prior administrator, or his personal representative, for all the original estate which has not been paid out in course of administration, including all that has changed form, *e. g.*, notes collected. The administrator *de bonis non* acts as trustee for all parties who are beneficiaries of the estate, and they look primarily to him, and not to the former administrator or his personal representative.

The American system is the law in most States, and the tendency everywhere is toward it. Some States, however, still retain the old system; and others are in a somewhat confusing transition. The nature of the settlement between the administrator *de bonis non* and the prior administration depends on the view of what constitutes administration in the respective States.

It is the province of the personal representative of a deceased guardian, administrator, or trustee to adjust the accounts of his decedent with the estate for which he acted. The probate court has authority to compel such settlements.

The settlement between an administrator *de bonis non* and a former administrator, although final as to the parties thereto, being conclusive upon heirs and others interested in the estate, and including waste committed by the former administrator, is not such final settlement of the estate as requires the notice to be given to all persons in interest previous to the winding up of an estate; such persons are represented by the administrator *de bonis non*, and to him alone all assets after the displacement of an executor or administrator are due and payable.

§ 536. **Accounting for Assets received in Foreign Jurisdiction.** — The liability of a foreign executor or administrator to account

generally, and of a domestic administrator to account for assets received in a foreign country or sister State, appears more fully from the chapter treating of principal and ancillary administration. It is stated, as a general proposition, that a foreign executor or administrator cannot be compelled to account, unless he has brought assets into the domestic jurisdiction; nor then, necessarily, as one answerable to the local probate court, or in his representative character, but rather as trustee in chancery, on general maxims.

Even then the executor is accountable, as trustee, only "for the breach of some express or constructive trust under the will, or as a trustee *ex maleficio*." ¹ As a rule the representative is not chargeable for assets in a foreign jurisdiction not received by him.

§ 537. **Compelling Final Settlement.** — Final settlements can not be compelled before the administrator has had time or opportunity to collect all the assets, and to ascertain and discharge all its liabilities. But if the failure to convert assets into cash is chargeable to the fault of the administrator, so that he can be held chargeable with their value, final settlement can be ordered. So, too, when all parties interested agree to a division of the assets in specie.

As a general rule, final settlement may be enforced in the probate court at any time after the expiration of the period allowed creditors to prove their claims against the estate, or at a time specifically pointed out by statute, if no special circumstances intervene rendering final settlement impracticable at such time. If parties interested fail to apply for final settlement for a long time, it is sometimes held that their application may be refused on the ground of their *laches*, in justice to the administrator.

§ 538. **Falsifications and Surcharges on Final Settlement.** — It is the duty of the court on final settlement to correct any errors, whether appearing in that report, in the prior annual settlements, or in any other manner; and this although there be no contest. Any mistake should be corrected upon which a conclusive judgment has not been rendered.

The accountant cannot, of course, be compelled to conform

¹ *Lewis v. Parrish*, 115 Fed. (C. C. A.) 285, 287.

his views to those of the court; but the court itself will restate the account, and render judgment thereon. In the final settlement credit may be given for future expenses necessarily incurred by the administrator in complying with the order of the court on final settlement.

§ 539. **Verification and Evidence.**—The statutes of most States require the account to be verified by the affidavit of the executor or administrator, which may be taken before any officer competent to administer oaths. For all items of credit claimed, there should be proper vouchers; but strict proof will not be required where, from the nature of the transaction, vouchers cannot be produced, or after a great lapse of time. The *onus probandi* rests upon the executor or administrator to establish the validity of any item of credit in the account which is challenged, and for want of sufficient *prima facie* proof such credit will be rejected.

Receipts given by parties still living at the time of the trial are not, in strictness, legal evidence of payment; but they are received as *prima facie* proof, unless the other side show a reasonable ground for their impeachment.

The administrator in such inquiry is not competent to testify for himself at common law; but under the law of most States, removing the disqualification of interest, he can do so.

§ 540. **Judgment on the Adjudication of the Account.**—Any person having an interest in the result of the accounting may appear when the account is before the court for adjudication, and object to any of the items for which credit has been taken or is claimed, and insist on charges against the accountant which have been omitted.

The rights of a person claiming property by a title paramount to that of the deceased, or the rights of a creditor of a legatee lie outside of the settlement. They are not parties in interest, and have no right to appear.

The proper method of objecting to the account is to state the exceptions in writing, pointing out each item objected to and stating the ground of the objection, and to file such statement so as to give sufficient notice to the other side to enable them to prepare their defence if they have any. But such exceptions need not necessarily be in writing where the issue is

tendered otherwise, as by hearing on the appearance of the parties.

The exceptors are not concluded from taking further exceptions to errors in the account which become apparent subsequent to the filing of the original objections, and which they had no means of knowing at the time; but in such case there must be sufficient time given to the adverse part to be heard in defence, and to procure witnesses to establish the same.

CHAPTER LIX.

OF APPEALS FROM COURTS OF PROBATE.

§ 541. **Right of Appeal given by Statutes.** — The right of appeal rests solely upon statutory provisions, and unless these provisions are complied with, the right cannot be made available; and there can be no appeal from any order, judgment or decree, unless the right to such appeal be given by statute.

§ 542. **Who may appeal.** — Where the right to appeal exists, it may be exercised by any person, whether a party to the record or not, who is aggrieved by the judgment or decree pronounced by the probate court. No person has the right to appeal unless he is interested in the estate as creditor, legatee, heir at law, or in some pecuniary manner.

§ 543. **From what Decisions of Probate Courts Appeals are Allowable.** — It is obvious that there can be no appeal from any action of a lower court which would not, but for the appeal, constitute a binding, conclusive, and final determination by order, decree, or judgment, of the rights of the parties affected thereby. Whether such order, decree, or judgment constitutes a final judgment, in this sense, is not always clear at first blush. It is deducible from the decisions on this subject, as a general principle, applicable to most cases in the absence of statutory provisions directing otherwise, that any order, judgment, or decree of the probate court capable of being enforced, or taking effect without further order, may be appealed from; and that no action of the probate court can be appealed from which requires a subsequent order or judgment to give it effect.

In each State the answer to the question whether an appeal lies from a probate decision involves the special statutes bearing on the matter in hand. The rulings rest on local statutes, and are not inconsistent with the general principles stated. The explanation of such cases, however, is beyond the scope of this treatise.¹

¹ For numerous illustrations, see Woerner on Administration, § 545.

§ 544. **How Appeal is taken.** — It has already been stated, that the right of appeal is dependent upon compliance with all the requirements of the statute from which it originates.

The time within which appeal must be taken is fixed by the statute. If the statute contain no saving clause, the right to appeal after the period allowed by the statute is barred, even to married women and infants.

The party appealing is always required to give bond, except in cases where the executor or administrator appeals in the interest of the estate and has given security on his administration bond. An executor is entitled to an appeal without surety where the judgment or decree is to affect only the assets, but where he is in a situation in which a personal judgment or decree can be rendered against him which may make him liable out of his own funds, he is no more entitled to appeal without surety than any other person.

All parties having an interest in the estate are parties to the appeal, and where the statute requires notice of the appeal to be given to the adverse party, it must be given to all who have any interest in the controversy; notice to the probate court is insufficient, although no one had attended at the trial in that court. The appeal, for the want of statutory notice, will in some States be dismissed, in others continued for the purpose of giving notice.

While any one item in an account is a separate claim, demanding a separate judgment from which appeal may be taken, yet a party is entitled to but one appeal from the same decree, although the decree makes disposition of various claims, and it is improper to allow a separate appeal for each claim.

§ 545. **Powers of the Probate Court after Appeal.** — Upon compliance with the statutory requirements on the part of the appellant, and the grant of appeal by the probate court, the matter appealed from is removed from such court, and it has no power, pending that appeal, to take further steps in regard thereto. But the judgment of the appellate court is limited to the particular matter appealed from, the appeal in no wise affecting the jurisdiction of the probate court over all matters not involved in the appeal. The effect on an appeal is, generally, to vacate the judgment or decree of the probate court, which is thenceforth of no force or effect.

The statutes of most States point out in what cases and under what circumstances an appeal from the order, judgment, or decree of the probate court shall operate as a supersedeas. It is generally enacted that an appeal properly perfected shall work a supersedeas if bond be given.¹

§ 546. **Nature of the Trial in the Appellate Court.** — Probate powers are vested, in some of the States, in courts of ordinary jurisdiction for the trial of all cases at law and in equity. From such courts probate decisions go up to the court of last resort upon the record for review of errors.

But in most States these matters are originally tried by tribunals specially created as courts of probate. On appeal from decisions of such courts in most states the case is triable *de novo* in some court intermediate between the probate court and court of last resort, before the latter can obtain jurisdiction.

§ 547. **Nature of the Trial de Novo.** — On appeal to a court not of last resort, the appellate court proceeds as if it had original jurisdiction of the matter brought before it by appeal, which vacates and annuls, for the purposes of such trial, the judgment of the court below. The appeal brings up the entire decree appealed from; new grounds may be taken in the appellate court, and new evidence introduced. But it is a settled rule that the issue tried in the appellate court must be the same, and no other, than that which was tried in the court below, and that the appellate court will grant such relief, and such only, as the court below should have given; it acquires no jurisdiction of a subject-matter by the appeal of which the court appealed from had none; but in matters of practice follows its own rules.

¹ For statutory details, see Woerner on Administration, § 548.

TITLE NINE.

OF THE CLOSE OF THE ADMINISTRATION.

PART I.

OF DISTRIBUTION TO LEGATEES AND NEXT OF KIN.

§ 548. **Duty of Probate Courts to order Distribution.** — The succeeding chapters consider the procedure by which the rights of the distributees of the estate are ascertained and announced, and the methods for their enforcement against executors and administrators.

In England it is still practically necessary to resort to courts of equity for the purpose, but in this country it is in most States the duty of probate courts, when it appears that all debts, legacies, and expenses of administration have been paid, to order the distribution of the residue, and to compel payment of the distributive shares to those who may be entitled thereto. Before considering the details of the proceedings before the court, it seems desirable to discuss the subject of advancements, because these constitute an element of distribution themselves, and must necessarily be taken into account in ascertaining the rights of the respective distributees.

CHAPTER LX.

OF ADVANCEMENTS.

§ 549. **Definition of Advancements.** — Advancements are described as gifts by a parent, *in præsentis*, of a portion or all of the share of his child in his estate which would fall to it under the Statute of Distribution or Descent; or, as a giving by anticipation, during the intestate's lifetime, of the whole or part of what the child would be entitled to on the donor's death. When the doctrine is applied in making distribution, the same is added to the estate, and the whole divided among the children, the advancement being retained by him to whom it was given. For instance, the deceased left \$20,000 and four children; he had advanced \$4000 to his son A. Each child save A gets \$6000 from the estate. A gets \$2000 from the estate and retains the advancement.

The gift, in order to constitute an advancement, must be irrevocable, divesting entirely all of the ancestor's interest, and forming no part of the property to be administered; hence, the donee can in no case be compelled to refund what he has received. But unless he consent to bring it into hotchpot, and take his share upon an equal division of the estate, including what is left for distribution as well as all that has been advanced during the intestate's lifetime, he will not be entitled to participate in the distribution. To bring into hotchpot does not mean that the party advanced shall return the property received *in specie* or in kind, or even that he shall relinquish his interest therein; but only that its value shall be reckoned against him in the distribution. And since the party advanced has his election whether to keep what he has and relinquish his claim to further distribution, or to come into hotchpot, he may wait, before electing, until the value of the estate is determined.

§ 550. **Distinction between Advancement and Ademption.** — It is of practical service to keep clear the distinction between an

advancement and an ademption or satisfaction. Ademption occurs after the making of a *will*, and applies to the discharge, or destruction of the subject, of *any* legacy or devise in the testator's lifetime, and is not limited to the gift by the parent to the descendant, as is the case in advancements. Furthermore, when the parent whose will makes the child a legatee or devisee, subsequently makes a gift to that child, it cannot be called an advancement, but is an ademption (or satisfaction), and is to be governed by the law on that subject. When the parent prior to making a will has made to a child a gift which would be viewed as an advancement, and subsequently leaves a legacy, without further explanation, to that child, it is evident that he has destroyed the character of that gift as an advancement. Of course the testator may in his will direct prior gifts to the child to be charged against him. In this narrow sense only can an advancement occur in connection with a will; and even then the term, though freely employed, is technically inaccurate to describe the situation. The doctrine of advancements rests only on statute; the doctrine of ademption, however much modified by statutes, exists independent of them.

§ 551. Jurisdiction over Advancements of Realty and Personalty.

— Since the probate court has generally no jurisdiction over realty, it has been ruled that, in making distribution of the personalty, that court must ignore advancements consisting of realty. But it has been held, on the other hand, that taking account of the value of realty in distributing personalty is not exercising jurisdiction over the realty, and thus advancements in realty have been taken into account in probate distribution.¹

§ 552. To whom the Doctrine of Advancements applies. — Whether any persons but children of the intestate are affected by the doctrine of advancements depends, of course, upon the various statutes. Gifts to grandchildren during the lifetime of their parents are not treated as advancements either to the grandchildren or to their parents, nor do they become so by the death of their parent before that of the grandparent. Whether gifts to parents dying before the intestate constitute advancements to be reckoned against the grandchildren of the intestate is also determined by statute in a number of States.

¹ Elliott's Estate, 98 Mo. 379, 384.

A sound rule seems to be, that in all cases where grandchildren take *per stirpes*, or in right of their parents, they take subject to advancements to the parents; but not so when they take *per capita*, or in their own right.¹

§ 553. **What constitutes an Advancement.** — Whether a gift or conveyance is to be regarded as an advancement or not, is of course determined by the intention of the donor at the time the gift is made.

Presumptions of what the intestate's intention was are raised by the law, which, however, are rebuttable by competent evidence reasonably definite. As between a loan, a gift, and an advancement, the presumption is in favor of an advancement, because of its tendency to equalize. The presumption that a gift was intended as an advancement does not arise when it is repelled by the nature of the gift, as in case of trifling presents, no account thereof being kept; or money expended in a child's education, whether general or professional, or merely for amusement or pleasure.

But where a father pays a child's debt without taking a note or security therefor, or advances him money for that purpose, or buys land in the name of, or makes a voluntary conveyance of land to the child, or where a marriage portion is given, or a sum or thing to be used for profit or setting up in business, it will be held, in the absence of contravening evidence, an advancement. Where a parent takes a note or other security for the repayment of the property given, with or without interest, it is *prima facie* a debt and not an advancement, although he declare that he will not collect the same. The statutes of many States expressly provide that maintenance, support, or money given without intending it as a settlement in life is not an advancement.² A gift, although it must be made in the donor's lifetime, may take effect at the donor's death, and still constitute an advancement, as, for instance, the gift of a policy of insurance on the donor's life.

§ 554. **Rights of Donees in Respect of Advancements.** — The donor can so alter the character of a gift or conveyance as to

¹ The statutory provisions in the various States as to the parties affected by the doctrine are collated in Woerner on Administration, § 559.

² See Woerner on Administration, § 559.

enlarge the rights and privileges of the recipient, but not so as to restrict them. Hence a father has the undoubted right to change a debt owing him into an advancement and an advancement into a gift; but not, without the donee's consent, an absolute gift into an advancement, nor, since it is irrevocable, the advancement into a debt.

An heir may release his expectancy in his father's estate in consideration of a present grant, and such agreement will be enforced, so that he cannot bring what he has received into hotchpot and get more in the distribution.¹

There are cases denying the validity of any assignment by an heir apparent of his expected inheritance to a third person on the ground that there is nothing *in esse* on which the conveyance can operate;² but the decided weight of authority in England and in this country upholds such an agreement in equity. It is, however, a transaction suggestive of imposition on an improvident heir, and is suspiciously scrutinized by courts.

§ 555. Computation of the Value of Advancements. — When not otherwise directed by statute, the value of advancements is reckoned as of the time when made, unless a contrary intention appears from the terms of the conveyance. The value of a gift to take effect in the future is to be computed from the time when it is completed by enjoyment in the donee. Thus where the advancement consists of a life insurance policy taken out for the benefit of a son, he should be charged with the net proceeds paid to him on the policy after the father's death.

Owing to the nature of advancements, which implies that the gift is an irrevocable one, and that therefore all loss or profit thereon accruing between the time of the gift and the donor's death must belong to the donee, he is not accountable for interest on nor for the increase of the advancement, unless expressly given on such terms; but this rule does not apply after the intestate's death.

In a few States statutes provide other rules as to the value of advancements.³

¹ Simon's Estate, 158 Mich. 256.

² McCall v. Hampton, 98 Ky. 166.

³ See Woerner on Administration, § 559.

§ 556. **How the Existence of Advancements may be shown.** — Unless inhibited by statute, the declarations of the grantor at the time of making, and the admissions of the donee at and after receiving the donation, are competent evidence to show whether an advancement was intended or not. It is held proper to prove all facts and circumstances tending to show the donor's intention, or from which it might be inferred; such, for instance, as the amount and value of the property conveyed as compared to the whole estate, the number of children, and whether advancements have been made to other children.

Book entries made by the donor at the time stand as part of the transaction; but entries made by him subsequently, like other subsequent declarations of the donor, seem only admissible when against his interest. Such subsequent declarations of the donor have been rejected when offered to prove an advancement, and have been received to prove the gift absolute, the latter being against the donor's interest.¹

¹ *Gunn v. Thruston*, 130 Mo. 339.

CHAPTER LXI.

OF THE DECREE OR ORDER OF DISTRIBUTION.

§ 557. **Refunding Bonds.** — In theory there should be no distribution until it is absolutely certain that sufficient funds are set aside for all possible creditors. That certainty cannot exist until the time for proving claims has expired. On the other hand, the retention of funds on the mere possibility of further creditors seems onerous and inconvenient.

The English Statute of Distributions and the statutes of most of the United States enable distribution to be made upon the execution by the distributees of refunding bonds, with sufficient sureties, conditioned to refund to the administrator so much of the assets received as may be necessary to pay debts and costs lawfully proved against the estate. The same principle is applicable to the payment of legacies.

In most States the language of the statute requires the bond only where distribution is desired before the time limited for the presentation of creditors' claims has expired, or before final settlement is made, while in a few States refunding bonds are seemingly required in every case of payment of a legacy.

In cases where there is no statutory provision for a refunding bond, or where there is such provision and it is not observed, the weight of authority seems to be that the executor or administrator cannot recover from the distributee or legatee a payment voluntarily made, unless there was fraud, or mistake as to fact. When the law provides for a refunding bond, and the administrator fails to require it, the omission is held to bar the executor or administrator from his remedy for contribution or reimbursement, unless the deficiency arose from unexpected occurrences, or by debts and claims not known at the time; it has been held that a mistake as to the value of the assets is not a sufficient equity to make the legatee or distributee liable to refund.

§ 558. **Parties to the Order of Distribution. Its Conclusiveness.** — It is the duty of probate courts in most States to order the distribution of the residue found, on final accounting, to remain in the hands of the executor or administrator, after payment of all debts and expenses of administration, to those who may be entitled thereto, provided that all parties interested had notice of such final accounting. The principle, that every party entitled to distribution must necessarily be before the court when distribution is decreed in equity, or have the opportunity to be present, is equally applicable in probate courts. When the statutory provisions are complied with, the distribution is said to partake of the nature of a proceeding *in rem*, and is conclusive upon all persons having any interest in the estate, whether appearing or not, and whether under disability or not, or whether then in being or not.

The appointment of a guardian *ad litem* for an infant is necessary only when the statute requires it. But when a distributee dies before the order, his personal representative is a necessary party.

Actual notice is not, generally, required to be given by the administrator of the presentation of the final account; it is sufficient if notice be given in the mode pointed out by statute.

Where action is taken by a legatee or distributee against the executor or administrator to compel distribution, not only the executor or administrator against whom the proceeding is directed, but all other parties who may be affected by the decree or judgment to be rendered should be parties, either as plaintiffs or defendants.

§ 559. **Nature and Scope of the Decree.** — Since the order or decree of distribution is the judicial ascertainment of the right of the next of kin or legatees to their respective shares in the estate under administration and as such a conclusive judgment, it is obvious that it must set out the name of each person entitled, and also the amount, sum, or specific thing due to each.

Where the estate consists of articles of different kinds and values, as of bonds, notes, stocks, or choses in action, of which some are good and others doubtful or desperate, so that a division cannot be effected giving each distributee his equal portion of the whole estate, it is sometimes necessary to order

the assets to be sold, so that the proceeds of the sale may be distributed according to the rights of the parties entitled, unless the parties are willing and competent to agree upon a division.

If the order of distribution is made upon the final settlement of the administration, and no unsettled claims against the estate or contingent liability of any kind exist, the order should extend to and finally dispose of all the assets found to be in the hands of the executor or administrator; it should not be made contingent upon the establishment at some future time of certain conditions which are guarded against by certain provisos in the decree. The executor must retain a sufficiency of the estate to pay a legacy which is not payable until the legatee's majority, or to yield a sufficient annuity until the annuitant's death; but the surplus income of the property so retained above the amount of the annuity may be distributed.

To authorize a decree of distribution there must be proof satisfying the court that the parties applying therefor are related to the intestate in the degree of consanguinity entitling them to distribution. This involves that proof must be made, not only that they *are* next of kin under the statute, but also that there are *no other* next of kin in the same degree; otherwise it will be impossible to determine the amount to which each may be entitled.

It has been held that where the right to administer is contested on the application for letters, the sole issue being the degree of relationship of the parties to the decedent, the determination of the court as to pedigree in such contest is conclusive upon the parties in the subsequent distribution of the estate; but such decree does not affect parties not cited who did not appear on the application for letters.

§ 560. **Rights of Assignees of Distributees.**—It has been mentioned, in discussing the subject of jurisdiction, that probate courts have not the power to adjudicate upon the validity of an assignment by a legatee or distributee of his interest in the estate, unless such power is expressly conferred by statute. But where such power is vested in these courts, their judgments are conclusive upon all parties thereto; hence, an order to pay a legacy to an assignee concludes the rights of an attaching creditor against the assignor. But whether the matter arise

in probate court (if the statute gives it jurisdiction), or in other tribunals, as will be the case in most States, since the assignee can have no greater right in a legacy or distributive share than the assignor possessed, it is obvious that any right of set-off which existed against the assignor is good against the assignee.

§ 561. **Set-off to Legacies and Distributive Shares.** — The indebtedness of a legatee or distributee constitutes assets of the estate, which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees, and distributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor.

The right to deduct exists whether the legatee or distributee was indebted to the deceased before his death, or contracted a liability to the estate thereafter. But a debt due the administrator personally cannot be set off. It is held that a son is not entitled to recover his distributive share of his father's estate, where the father was surety for him in an amount greater than the value of said share, although the executor did not pay the surety debt until after the action brought by the son. But whether the administrator has a superior right to demand payment of a debt due to the intestate from the insolvent heir out of the *lands* such heir inherits, as against the grantee or creditor of such heir, has been variously decided. The question turns largely on the extent to which realty comes into the settlement under the statutory systems of the various States, and cannot be further followed within the limits of this treatise.

The Statute of Limitations does not operate the extinguishment of a debt, but bars the remedy only; hence such debts may be deducted from, or set off against, legacies or distributive shares, notwithstanding the efflux of the statutory period of limitation. But this doctrine, well established in English courts of chancery and generally in this country, is repudiated in several States.¹

§ 562. **Distribution of Personalty by Law of Domicile.** — The law of the domicile governs the distribution of personalty, whether testate or intestate. But as this principle can be enforced by comity only, it must yield to the established policy of the state of the forum, so that, when the law of the domicile is

¹ See the subject discussed in Woerner, § 564.

repugnant to such policy, it will not be recognized in the distribution of the ancillary estate.¹

§ 563. **The Widow's Rights not affected by Remarriage or Prior Gift.** — The right of the widow to a share in her deceased husband's estate is not affected by her subsequent marriage before she actually receives such share; and, on the other hand, her share is determined by the amount of property in the husband's possession at the time of his death, so as to exclude her from any interest in advancements to his children made during his lifetime, and to relieve her from accountability for property received by her from her husband before his death.

§ 564. **The Share of a Deceased Distributee goes to his Personal Representative.** — It follows from the doctrine of the vesting of the distributee's interest at the time of the intestate's death, that if a person entitled to distribution die before distribution is made, or his legacy paid to him, his share will go to his legal representative, and not to those who, by reason of his death, have become the next of kin of the intestate.

§ 565. **Rights of Posthumous and Pretermitted Children.** — Posthumous children, as stated in an earlier chapter, take equally with those born during the ancestor's lifetime and surviving him. Pretermitted children, by virtue of the statutes of most States, succeed to the same interest in the father's estate as if he had died intestate. But since the will is not revoked or annulled by the omission to provide for the testator's children, but remains in force in every respect save as affected by the rights of these, provision is generally made charging each devisee and legatee with a proportional contribution to make up the necessary portions. As the rights of the pretermitted child stand as if the ancestor had died intestate, they can be enforced for their proper portions against all persons claiming through or under devisees or legatees, even though such persons had no notice of the claim of such child; as, for instance, against the purchasers of land sold under a power in the will for the benefit of beneficiaries.

§ 566. **Distribution without Administration.** — The doctrine of the common law whereby personal property devolves to the executor or administrator, and not to the distributee or legatee,

¹ See Woerner, § 565; *Despard v. Churchill*, 53 N. Y. 192.

involves the principle, that no one can obtain a legal title to the property of a deceased person except through an executor or administrator, and the consequent necessity of administration of estates has heretofore been considered. It may be well to repeat, however, an exception to this rule, *viz.*, when the distributees, being *sui juris*, by agreement divide the estate among themselves without administration, it is good as between themselves; but of course of no force as against any one else. The parties to the agreement are bound by estoppel.¹ If such distribution is made without satisfying a debt due by the deceased, the creditor may of course compel administration, or, if that is impracticable for any reason, he may sue for the debt as well as foreclose any lien he may have, making the heirs defendants, without himself administering.

§ 567. **Partial and Premature Distribution.** — When not endangering the rights of creditors or of the administrator the court may order a partial distribution of the estate, on the application of a legatee or distributee, before final settlement, usually on giving a refunding bond if the time to prove debts has not expired, and on notice to all parties interested.

Where administration of the estate is had, the administrator will be protected in paying over to a legatee or distributee his share of the estate, if all the debts allowed against the estate have been paid, and the time has expired within which claims may be presented for allowance, except upon special application to the probate court, although there has been no order of distribution or final settlement. The executor may retain out of each legacy which he is ordered to pay the sums already paid to each legatee respectively. The right of the administrator or executor to recover from a distributee or legatee an unauthorized over-payment is discussed *ante*, § 557.

§ 568. **Partition of Real Estate in Courts of Probate.** — Since the probate court possesses only statutory powers and such as are necessarily incidental thereto, and since the real estate of the deceased in almost all States goes primarily to the heirs or devisees, subject to jurisdiction of probate court only for special purposes (*e. g.*, the payment of debts), partition of the realty

¹ *Waterhouse v. Churchill*, 30 Colo. 415. See as to the necessity of administration and the exceptions, *ante*, §§ 184-185.

of the deceased is not within the jurisdiction of the probate court without express statutory authority. In a large number of States the probate court has by statute jurisdiction of partition of realty between heirs and devisees. Where such power is given "the connection between the administration, settlement, distribution, and partition of an estate is such, that the power to make partition may be justly regarded as ancillary to the power to distribute such estate, and, therefore, not alien to the probate system as it has long existed and now exists in many States."¹

The jurisdiction of the probate court, where it is given at all, is limited to the interest in the realty derived from the deceased; and even within these limits "that court has no jurisdiction of the question of the title of the land, but only of the mode of partition, assuming that the title existed in the intestate or testator. The partition, so far as the court have jurisdiction, is conclusive; that is, to the matter of division among the heirs or devisees, of whatever estate exists, which they have a right to have thus divided." "But beyond that the decree has no effect. . . . The question of estate and title is assumed, and the proceeding is for the purpose of dividing whatever estate or title exists. If none finally exists, the proceeding goes for nothing. . . . If the assumed title fail, the effect of the decree fails also."² But within the scope of the power conferred upon the court the partition is conclusive; the decree is as conclusive upon the parties to the proceeding in respect of the matter of division among the heirs as the judgment or decree of any other court. Contingent remaindermen or persons to take under an executory devise, who may come into being at a future time, are bound by the judgment in partition, on the theory of being virtually represented by the parties to the action, in whom the present estate is vested.

As a general rule the holder of a life interest in an undivided part of the estate can enforce partition, but not the owner of a life interest in the whole tract. The holder of the estate by the courtesy generally cannot ask for partition.

Where the land is incapable of division in kind without detri-

¹ Robinson v. Fair, 128 U. S. 53, 84.

² Grice v. Randall, 23 Vt. 329, 342.

ment to owners, a sale of the whole, and division of the proceeds is usually authorized. So too the statutes in many States recognize the doctrine of owelty, whereunder the person to whom the more valuable tract is assigned stands bound, with a lien on the property, to the person taking the less valuable tract for an equalizing amount. But in probate court partitions there must always be statutory authority for such action.

It is held in States where probate courts have not jurisdiction in partition, and the proceedings are brought in courts of general jurisdiction, that while partitions ought not to be ordered until it be ascertained that the personalty is sufficient to pay the debts, yet the action may be begun before that time; it is only necessary that the entering of the order or decree be postponed until it is determined whether any and, if so, what part of the land be required for the payment of the debt.

Advancements to the heirs are to be charged against them in partition proceedings as part of their respective shares; and if they have not been adjudicated by the probate court having jurisdiction of the estate, the court before which partition is pending may, before decreeing partition, require the parties to account for their advancements; and a purchaser from an heir stands in the same relation to the estate as the heir, and he may show advancements to the other heirs.

§ 569. Enforcing the Order to pay Legacies and Distributive Shares. — When the executor has assented to a legacy an action at law lies against him. Courts of equity will decree distribution when the probate court is without power to grant adequate relief, and will even do so, in some States (as we have seen in discussing the question of the necessity of administration, *ante*, § 185), without previous administration, when it appears that there are no creditors. The executor is a trustee for the legatee, subject to the payment of debts. Where debts do not exist, equity in these States assumes jurisdiction to enforce the legatee's right.

An administrator cannot at common law plead the Statute of Limitations in bar of a suit against him by the next of kin for their distributive shares. But this rule is changed in many States; and where that is the case, courts of equity will follow

the rule at law, and hold the remedy barred in analogy with the Statute of Limitations.

§ 570. Enforcement of Distribution under American Statutes. — The principles laid down in the foregoing sections are applicable to the older system of administration; but are greatly changed by the statutes, existing in the States, constituting what has repeatedly been called the American system. Under such statutes, the question of the executor's or administrator's liability is mostly determined by the probate court, whose order of distribution or payment of legacies now takes the place of the executor's assent, and of the corresponding investiture of title in the distributee, and changes the character of the liability of executors and administrators from an *official* to a *personal* one; and the beneficial or inchoate title of the legatee or distributee becomes legal or absolute, enabling him to recover, by suit against debtors of the deceased in his own name, upon any cause of action assigned or distributed to him. Hence in these States it is generally held that the trust relation of the executor or administrator ceases, and the Statute of Limitations for the recovery of a legacy or distributive share begins to run from the time of final settlement or order to pay legatees and distributees; and that thereafter the representative is subject to garnishment by a creditor of the legatee or distributee.

Additional remedies of various kinds are provided by the statutes of several States. In a number of States it is provided that, after order of distribution and demand made upon the executor or administrator and failure to pay over, execution shall issue out of the probate court against the delinquent.

A most summary remedy is given to legatees and distributees in California, Colorado, and Illinois, where the refusal to pay a legacy or distributive share after the order of the probate court to do so is treated as contempt of court, and may be punished by imprisonment of the delinquent executor or administrator until he comply with such order, and it has been so held in New York.¹

§ 571. Disposition of Unclaimed Legacies and Distributive Shares. — Legacies and distributive shares due to persons who,

¹ For further details as to statutory remedies, see Woerner on Administration, § 569.

for any reason, do not call for them, are, under statutory provisions of several of the States, to be invested or paid into the State treasury until called for.

In some States the administrator invests the sums for a time, ultimately also paying into the public treasury. The money so paid into the State treasury may be withdrawn by the legatee on proper proof, but without interest, and on payment of all costs.¹

When no claim is ultimately made, the doctrine of escheat applies, discussed *ante*, §§ 124-131.

¹ For the statutory law, see Woerner on Administration, § 569.

PART II.

OF THE ESTATE AFTER OFFICIAL ADMINISTRATION.

CHAPTER LXII.

OF THE STATUS OF EXECUTORS AND ADMINISTRATORS AFTER FINAL SETTLEMENT.

§ 572. **Res Judicata as a Defence after Final Settlement.** — In England a court of equity might decree accounting notwithstanding a previous accounting and distribution in the spiritual court, and so a new accounting became necessary whenever the executor was obliged to plead *plene administravit* in a suit at law. But in the United States the tribunals intrusted with jurisdiction over the estates of deceased persons are clothed with the powers and dignity of courts, whose judgments and decrees are as binding and conclusive as those of other courts. Hence the plea of *res judicata* affords a complete defence to executors and administrators against the demands growing out of any matter of administration, in so far as the probate court has lawfully adjudicated thereon.

And it is equally obvious that that which has not been tried cannot have been adjudicated; the final settlement of an executor or administrator can therefore be conclusive or binding upon nothing which was not either directly before the court, or necessarily involved in that which was before the court and adjudicated. That which is not within the scope of the issues presented cannot be concluded by the judgment.

§ 573. **Duration of the Office at Common Law.** — At common law the office of executor or administrator does not terminate during his lifetime, unless he be removed by a court of competent jurisdiction. Without statutory authorization to that effect, probate courts have no power to accept the resignation of an executor or administrator, and a discharge or removal

for any cause or in any manner except as pointed out by statute is simply void. It also follows that, unless discharged in accordance with some statutory provision, neither the authority nor the liability of executors or administrators is at all affected by the settlement of a final administration account, except as it may protect them under the doctrine of *res judicata*.

If, therefore, property of the deceased is discovered after the final settlement, the existence of which was then unknown and could not for that reason be administered, the administrator and his sureties will be liable therefor, and subject to the same proceedings against them as in respect of the property coming originally to the hands of the administrator. So their functions in other respects remain unextinguished after final settlement, and an order of discharge made by the probate court can be regarded as a discharge only so far as the particular matters appearing upon the face of the account are concerned.

§ 574. **The American Theory of the Duration of the Office.** — Courts, in view of the great desirability of relieving these officers from further harassment, their sureties from the anxiety attending continuous liability, and distributees and legatees, heirs, and devisees from the uncertainty of their tenure of the property descended to them, have gone to the extent of declaring the executor or administrator *functus officio* by virtue of his final settlement, or of an order of discharge by the probate court, in the absence of a statute authorizing such order. However consistent such ruling may be with the spirit of our system of administration, it is not quite clear that either a final settlement without a discharge by the court, or an order of discharge not authorized by statute, can relieve an executor or administrator of the duty imposed upon him by law of collecting assets discovered after final settlement, and administering them by payment to creditors, legatees, or distributees; or protect him against liability for assets concealed by him and not accounted for in his inventory or settlement.

§ 575. **Statutory Provisions for the Discharge of Executors and Administrators.** — Statutes provide for the removal and resignation of executors and administrators, as discussed *ante*, § 258. In such cases an administrator *de bonis non* continues the administration.

But when a final settlement is made the executor or administrator is not necessarily discharged. He is responsible for assets subsequently discovered. As the final settlement did not involve such items, neither the plea of *plene administravit* nor that of *res judicata* can afford protection as to such items against creditors or distributees. To put an end to this indefinite possibility of liability on the part of the administrator or executor (and also of the sureties) it is enacted in a number of States¹ that proof of full administration with satisfactory vouchers showing payment and delivery to those entitled of all the property of the estate, and performance of all acts lawfully required of him, entitles the executor or administrator to a full discharge from all liabilities thereafter. In some of the States proof must be made, in addition to proof of the facts above mentioned, of notice given of the intended application for discharge. It is held under these statutes, that the dismissal by judgment of the court of ordinary is a complete bar, both at law and in equity, unless impeached for fraud, the legislature announcing that the discharge is a *release*. Under such statutes discharging an administrator, an administrator *de bonis non* must be appointed, if assets of the estate are subsequently discovered.

In a number of other States there are statutes defining the extent of the protection which the judgment on the final settlement affords the executor or administrator; but they are to be distinguished from the statutes first mentioned in that they do not result in the discharge of the personal representative. They do not make him *functus officio*.

¹ See Woerner on Administration, § 573.

CHAPTER LXIII.

OF THE LIABILITY OF THE ESTATE AFTER FINAL SETTLEMENT.

§ 576. **Liability of Legatees and Distributees after Settlement to Creditors of Deceased at Common Law.** — Since all personal property descends, not to the next of kin, distributee, or legatee, but to the executor or administrator, the creditor is confined to his remedy against the latter; from which it follows that, without some statutory provision in the State under whose laws the property descends, neither legatees nor distributees can be made liable for the debts of the testator or intestate.

§ 577. **Liability of Heir and Devisee at Common Law.** — At common law the heir was liable for the debts by specialty of his ancestor; he was bound to satisfy them to the extent of the value of the land descended to him. But if he had aliened the land before action or proceeding against him for the ancestor's debt, the creditor had no remedy. The heir was not liable for other debts. Devisees are not liable at the common law for either specialty or simple debts. But of course the heir and devisee take realty subject to charges thereon, *e. g.*, mortgages.

§ 578. **Liability of Beneficiaries of Estate under Statutes.** — The law of all States subjecting realty to debts in the course of administration, heretofore discussed, has substantially changed the position of heir and devisee with reference to rights of creditors of the ancestor or testator.

In addition, the law everywhere provides a remedy for such creditors of the deceased as had no standing during the administration, against heirs, devisees, distributees and legatees. The statutory changes were brought about in England too late to be part of our American common law, and so do not affect our statutes.

§ 579. **What Creditors can claim after Final Settlement.** — If the creditor could have presented his claim in the course of

administration of the estate, he cannot avail himself of these statutes. Only holders of claims which are not barred by the statute of Non-claim (*e. g.*, contingent claims where the cause of action accrued too late for presentation within the time fixed by the Statute of Non-claim, in the administration) can be enforced after final settlement against beneficiaries of the estate. As long as any other remedy is open, these statutes cannot be invoked.

§ 580. **Extent of Liability of the Beneficiary of Deceased.** — The recipient of property of a deceased person by descent or distribution, or gift from the testator, is self-evidently never liable for more than he has received, unless he has unlawfully intermeddled, so as to make himself liable as executor *de son tort*. Interest is not charged on that value. No improvements put on the land by the heir or devisee will enter into the valuation, nor is he liable for rents and profits; but he cannot, on his side, claim credit for repairs.

§ 581. **The Creditor's Form of Remedy against Beneficiaries of Estate.** — It is mostly provided by statute, that where the heir or devisee has aliened his share of the property descended or devised, he becomes personally liable to the ancestor's creditor to the amount of its value. In some States the creditor's action is held to authorize a personal judgment against the heir or devisee only, so that an order to sell the specific land descended is erroneous; but in others, the judgment is directed to be satisfied out of the lands descended, if they have not been aliened.

A purchaser from an heir or devisee, after the expiration of the time during which the real estate may be subjected to the payment of the debts of the decedent in the probate court, and before suit brought by a creditor against the heir, obtains a title which is superior to the right of the creditor; but the devisee himself, by accepting the devise, makes himself personally liable to the creditor to the extent of the value of the land devised.

The general remedy of a creditor, whose right of action accrued after the time in which claims may be presented against the estate while under administration, is by bill in equity against the recipients of property from a solvent estate, for contribution to the extent of the estate received by them; but whether a creditor must proceed against all jointly, or may hold each sep-

arately for his proportion of the debt, or hold any one or more of them liable for the whole of the debt, not exceeding the amount received by each, so as to compel those from whom he recovers to seek contribution from the other heirs or distributees, is held differently in different States.¹

¹ See on these and similar points Woerner on Administration, § 579.

INDEX.

INDEX.

A.

[References are to Sections]

ABANDONMENT,

- as affecting homestead, 102.
- as affecting provisional alimony, 90.

ABATEMENT OF ACTIONS. See REVIVAL OF ACTIONS; SURVIVAL OF ACTIONS.

ABATEMENT OF LEGACIES. See SATISFACTION OF LEGACIES.

ABSENTEES,

- administration on estates of, 192.

ACCOUNTING,

- between surviving partner and representative of deceased, 119.
- between administrator d. b. n. and predecessor, 173, 343, 344.
- in ecclesiastical courts, and in equity, 498.
- modern periodical accounting, 499.
- passing on account by court, 500.
- jurisdiction of probate courts over, 501.

See ANNUAL SETTLEMENTS FINAL SETTLEMENTS.

- what the account must show, 507.
- inventory as foundation of account, 508.
- what interest chargeable, 509.
- debts of executor and administrator to be charged, 510.
- when rent and proceeds of realty chargeable, 511.

See EXPENSES OF ADMINISTRATION.

- allowance for widow and children 518.
- payments on debts as credits, 520.
- payment in anything but cash, 521.
- credit for difference between actual value and inventory, 522.
- interest on advances as credit, 523.

See COMPENSATION OF EXECUTOR AND ADMINISTRATOR.

- by co-executors and by co-administrators, 534.
- for unfinished administration, 535.
- for assets received in foreign jurisdiction, 536.

ACCRETIONS,

- as assets, 296.

ACTIONS,

- by and against surviving partners, 113.
- for injuries resulting in death, 188.

See SURVIVAL OF ACTIONS.

[References are to Sections]

ACTIONS — *Continued.*

duty of personal representative to prosecute and defend, 311.

See REVIVAL OF ACTIONS.

See CLAIMS AGAINST ESTATES OF DECEASED PERSONS.

ACCUMULATION OF INCOME. See INCOME.

ADEMPTION,

distinguished from satisfaction of legacies, 443.

legacy presumed in satisfaction of debt, 444.

by gift to child, 445.

admissibility of parol evidence on question, 446.

statutory provisions affecting, 447.

distinguished from advancement, 550.

ADJOURNMENT OF SALE OF REALTY,

when permitted, 478.

ADMINISTRATION,

reasons for its necessity, 184.

circumstances under which it is dispensed with, 185.

on estates of living persons, 191.

on estates of absentees, 192.

on estates of non-residents, 187, 229.

validity of without bond, 236.

what constitutes at common law, 343, 535.

under modern statutes, 344.

distribution by consent without administration, 566.

ADMINISTRATION BOND,

origin of law requiring, 232.

not required of executors at common law, 233.

when court can order executor to give bond, 234, 235.

validity of administration without bond, 236.

when additional bond can be ordered, 237.

ex mero motu or at instance of interested parties, 239.

judgment against administrator, as evidence against the sureties, 238.

the nature of liability on the second bond, 239.

the nature of liability of sureties, 238.

formal requisites, 242.

amount of penalty, 243.

joint and separate, 244.

approval and custody, 245.

liability on order to pay debts, 402.

ADMINISTRATOR,

for matters common to EXECUTORS AND ADMINISTRATORS, see that title.

distinguished from executor, 167.

when title vests, 168.

relates back to death of intestate for certain purposes, 169.

for special administrators, see their respective titles.

his acts before grant of letters, 179.

principles governing appointment, 218.

the husband's right to appointment, 218, 219.

the widow's right to appointment, 220.

the right of next of kin, 221.

[References are to Sections]

ADMINISTRATOR — *Continued.*

- the right of creditors, 222.
- the right of the public administrator, 223.
- disqualifications, excluding from appointment, 224.
- the court's discretion in appointing, 225.
- renunciation of right to administer, 226.
- result of renunciation, 227.
- appointment of administrator with limited powers, 231.

ADMINISTRATOR *AD LITEM*, 176.

ADMINISTRATOR *DE BONIS NON*,

- what the office is, 173.
- who entitled to appointment, 230.
- of what he takes charge at common law, 343.
- of what under modern statutes, 344.
- how far bound by acts of predecessor, 343.
- successive administrators have but one compensation, 529.
- accounting with predecessor, 535.

ADMINISTRATOR *PENDENTE LITE*, 175.

ADMINISTRATOR WITH THE WILL ANNEXED,

- what the office is, 172, 228.
- who entitled to such letters, 228.

ADMISSIONS,

See DECLARATIONS.

- by beneficiaries in will contests, 208.
- by personal representative as binding estate, 369.
- by personal representative do not stop statute of non-claim, 392.
- by personal representative as against statute of limitations, 392.

ADOPTED CHILDREN,

- inheritance by, from, and through, 73.

ADVANCEMENTS,

- the term defined, 549.
- distinguished from ademption, 550.
- jurisdiction of probate court when advancement is realty, 551.
- to what distributees the doctrine applies, 552.
- to deceased person, when charged against his child as distributee, 552.
- what constitutes advancement, 553.
- donee's rights in respect to, 554.
- computation of value, 555.
- evidence to show advancements, 556.
- charged in partition of realty, 568.

ADVERTISEMENT. See NOTICE.

AFFIDAVIT. See OATH.

ALIENS,

- power to take personalty and realty of intestate or by will, and to will the same, 12.

ALLOWANCE OF CLAIM BY PERSONAL REPRESENTATIVE,
final, in some states, 378.

ALLOWANCE OF CLAIMS IN PROBATE COURT. See CLAIMS
AGAINST ESTATES OF DECEASED PERSONS.

[References are to Sections]

ALLOWANCE TO WIDOW AND CHILDREN. See PROVISIONAL ALIMONY.

ALTERATIONS,
in wills, 47.

AMBIGUITY,
latent and patent, evidence to explain, 413.

ANCESTRAL ESTATES,
their devolution, 76.

ANCILLARY ADMINISTRATION,
discussed, Chapter XVII.
See DOMICILIARY AND ANCILLARY JURISDICTION.

ANIMALS,
as assets, 267.
as pertaining to realty, 267.

ANNUAL SETTLEMENTS,
only *prima facie* valid, not *res adjudicata*, 502.

ANNUITIES,
when they go to personal representative, 287.
resort to general estate when fund fails, 454.
interest on, 459.

ANTE NUPTIAL SETTLEMENTS. See MARRIAGE SETTLEMENTS.

APPEALS FROM PROBATE COURTS,
subject discussed, Chapter LIX.
right given only by statute, 541.
who may appeal, 542.
from what decisions, 543.
within what time, 544.
the appeal bond, 544.
the notice of appeal, 544.
power of probate court after appeal, 545.
procedure on appeal, 546.
trial *de novo*, 547.

APPRAISEMENT,
of goods and chattels inventoried, 308.
prior to sale of realty, 477.

APPRENTICES,
how contract affected by death, 288.

ARBITRATION,
power of personal representative to submit to, 315.

ASSENT,
of executor to legacies, 450.
suit against executor thereon, 569.

ASSETS,
heirlooms not personalty, 260.
joint property, 262.
chattels real, 264.
mortgages, 266.

[References are to Sections]

ASSETS — *Continued.*

vendor's lien, 266.
 animals, 267.
 vegetables, 268.
 emblements, 269.
 fixtures, 270-272.

See SURVIVAL OF ACTIONS.

patents, copyrights and trade marks, 289.
 rents, 290.
 assets defined, 294.
 distinguished from property held in *auter droit*, 294.
 benefits allowed after death, 295.
 insurance as assets, 295.
 realty bought by personal representative for estate, 295.
 accretions, rents, interest, 296.
 property in foreign jurisdiction, 297.
 debts of executor or administrator, 299.
 property held in *auter droit* not asset, 300.
 legal and equitable, 301, 482.
 personal and real, 302.

ATTACHMENT,

will not lie for decedent's debt, 380.

ATTESTING WITNESSES,

method of signature, 36.
 their competency, 38.
 proof when they are not accessible, 201.
 when they repudiate attestation, 201.

B.

BASTARDS. See ILLEGITIMATE CHILDREN.

BEQUESTS. See LEGACIES.

BILLS AND NOTES. See NEGOTIABLE PAPER.

BONA NOTABILIA, 187.

See CHoses IN ACTION; JUDGMENTS; DEATH AS FOUNDATION FOR
 CAUSE OF ACTION.

BOND. See ADMINISTRATION BOND.

of executors and administrators, 232-245.
 given in successive trust capacities, 241.
 of personal representative on sale of realty, 473.
 on appeal from probate court, 544.
 refunding bond to secure speedy distribution, 557.

BUSINESS. See TRADE.

C.

CANCELLATION OF WILL. See REVOCATION OF WILL,

CAUSA MORTIS. See DONATIONES MORTIS CAUSA.

[References are to Sections]

CHARITABLE USES,

what are, 422.

43 Elizabeth as part of present laws, 423.

upheld where other trusts fail for indefiniteness, 424.

continue indefinitely though vesting subject to rule as to perpetuities, 425.

the doctrine of *cy-pres*, 426.

masses for the dead, 427.

CHATTELS REAL. See LEASEHOLD ESTATES.

CHILDREN. See ADOPTED CHILDREN; INFANTS; ILLEGITIMATE CHILDREN; POSTHUMOUS CHILDREN; PRETERMITTED CHILDREN.

CHOSSES IN ACTION,

where *bona notabilia* for probate jurisdiction, 187.

CLAIMS AGAINST ESTATES OF DECEASED PERSONS. See PRIORITY OF DEBTS.

the common law system of payment, 346.

debts of deceased distinguished from liabilities of administration, 347.

See FUNERAL EXPENSES.

expenses of last illness, 351.

See PAYMENT OF DEBTS.

exhibition of, see EXHIBITION OF CLAIMS AGAINST ESTATES.

the jurisdiction of probate court to allow claims, 379.

equitable defences in probate court, 380.

attachment will not lie for decedent's debt, 380.

claims against estates of married women, 381.

not matured, see CLAIMS NOT MATURED.

contingent, see CONTINGENT CLAIMS.

claims of personal representative, 384.

claims of relatives of deceased, 385.

notice for allowance distinguished from exhibition, 386.

when set-off can be claimed, 387.

See STATUTE OF NON-CLAIM.

See MORTGAGES AND COLLATERAL SECURITY.

CLAIMS NOT MATURED,

what judgments rendered on, 382.

CLASSES. See TESTAMENTARY CLASSES.

CO-ADMINISTRATORS. See Co-EXECUTORS.

CODICILS,

as republication of will, 43, 55.

CO-EXECUTORS,

priority between when in different states, 156.

joint and several bonds, 244.

voting stock of deceased, 317.

all join in exercising power, 333.

statutory changes, 335.

joint; not joint and several, 339.

all must be joined in suit, 339.

liability of one for acts of another, 340.

protection of one against acts of another, 341.

[References are to Sections]

CO-EXECUTORS — *Continued.*

their compensation, 528.

accounting by, 534.

COLLATERAL INHERITANCE TAX,

discussed, 320.

COLLATERAL SECURITY. See MORTGAGES AND COLLATERAL SECURITY.

COMMISSION. See COMPENSATION OF EXECUTOR AND ADMINISTRATOR.

COMMON FORM,

probate of will in, 196, 198.

COMPENSATION OF EXECUTOR AND ADMINISTRATOR,

not at common law, but by statute, 524.

has priority over debts owing by estate, 524.

in case of maladministration, 525.

on what commissions are allowed, 526.

compensation for extra services, 527.

of joint executors or administrators, 528.

validity of agreement to divide commissions, 528.

of successive administrators, 529.

bequest to executor as affecting commission, 530.

where same person is executor and trustee, 531.

method of charging, 532.

COMPOUNDING WITH DEBTORS,

powers of personal representative, 314.

CONDITIONS TO LEGACIES AND DEVISES,

precedent and subsequent, 434.

repugnant conditions, 435.

restraint of alienation, 435.

spendthrift trusts, 436.

gift conditioned on religious qualifications, 437.

for separation of married couple, 438.

against disputing will, 439.

in restraint of marriage, 440.

CONFLICT OF LAWS,

change in law as to testamentary formalities, 37.

devolution of realty by law of state where land lies; of personalty by intestate's domicile, 78.

what law governs provisional alimony, 95.

what law governs homestead, 109.

mode of administration, including priority in claims by law of forum, 163.

distribution of personalty by law of domicile, 164.

descent of realty by *lex rei sitæ*, 165.what is realty determined by *lex rei sitæ*, 165.

See SITUS OF PROPERTY.

extra-territorial enforcement of Lord Campbell Acts, 285.

accountability for assets in foreign jurisdiction, 297, 309.

in what sovereignty personalty is taxable, 319.

in what county personalty is taxable, 319.

distribution of personalty by law of domicile, 562.

[References are to Sections]

CONSTRUCTIVE CONVERSION,

of realty into personalty and *vice versa*, 336.

CONSTRUCTION OF WILLS,

at common law only realty owned at date of will passes, 50.

how far probate court has jurisdiction, 151.

jurisdiction of equity to construe wills, 152.

subject discussed, Chapter XLVI.

ascertaining testator's intention, 404.

several parts construed together, 405.

general intent controlling particular, 406.

terms repeatedly used, 407.

transposition of words and limitations, 408.

precatory trusts, 409.

life estates by implication, 410.

speaks from testator's death, 411.

construed as of date of execution, 412.

extrinsic evidence, 413.

condition against disputing, 439.

classes, see TESTAMENTARY CLASSES.

gifts to children, grandchildren, issue, how construed, 414.

rule in Wild's case, 414.

when descendants of donee take per capita, when per stirpes, 415.

heirs, legal heirs, descendants, relatives, next of kin, construed, 415.

cumulative repeated and substituted legacies, 442.

gifts of rents and profits construed as devise of land, 492.

CONTEST OF WILLS,

in federal courts, 154.

administration *pendente lite*, 175.

various methods, 200.

is *in rem*, 200.

can attack only part of will, 200.

who can institute control, 200.

CONTINGENT CLAIMS,

liability for at common law, 367.

how far regarded in probate court, 383.

CONTINGENT LEGACIES AND DEVISES,

distinguished from vested, 430.

CONTRACTS OF DECEASED,

with apprentices and servants, 288.

duties of personal representative as to, 317.

when terminated by death, 317.

CONTRIBUTION,

enforceable among beneficiaries under will, 497.

COPYRIGHTS,

go to personal representative, 289.

CORPORATIONS,

as executors, 216.

as testamentary donees, 418.

as donees in trust, 419.

See STOCK.

[References are to Sections]

- CORPSE,
right to control disposition, 261.
- COSTS,
in litigation incident to administration, 515.
- COUNSEL FEES,
reasonable, allowed administrator, 513.
when counsel fees not allowed, 514.
of executor in litigation to establish will, 516.
- COVENANTS OF TITLE,
when action lies by or against personal representative, 282.
in administrator's deed on sale of realty, 481.
- CREDITORS. See CLAIMS AGAINST ESTATES OF DECEASED PERSONS.
- CY-PRES,
applied to charities, 426.

D.

- DEATH AS FOUNDATION FOR CAUSE OF ACTION,
claims under Lord Campbell Acts as *bona notabilia*, 188.
the proof of, and presumptions as to, 190.
for whose benefit, 284.
extra-territorial enforcement, 285.
- DEBTS OF DECEASED. See CLAIMS AGAINST ESTATES OF DECEASED PERSONS.
- DEBTS OF EXECUTOR OR ADMINISTRATOR TO DECEASED,
liability to estate at law and in equity, 299, 510.
charged in account, 510.
- DECLARATIONS,
of testator as evidence of testamentary capacity, etc., 207.
as evidence of contents of last will, etc., 207.
on questions of ademption, 446.
of donor on question of advancement, 556.
- DEED,
by administrator on sale of realty, 481.
- DEMONSTRATIVE LEGACIES,
what are, 441.
when they abate, 449.
- DESCENT AND DISTRIBUTION, Chapter VIII.
"descent" applies to realty; "distribution" to personalty, 66.
distinction does not exist in America, 66.
affinity and consanguinity, 67.
the degrees of collateral relationship, 68.
statutory modifications, 70.
See REPRESENTATION.
- the half blood, 71.
posthumous children, 72, 565.
adopted children, 73.
illegitimate children, 74.
aliens, 12.

[References are to Sections]

DESCENT AND DISTRIBUTION — *Continued.*

- ancestral estates, 76.
- effect of killing of ancestor by heir, 77.
- distribution of personalty governed by law of domicil, 164.
- descent of realty governed by *lex rei sitæ*, 165.

DEVASTAVIT,

- meaning of the term, 533.

DEVICES,

- for matters in common with legacies*, see LEGACIES AND DEVICES.
- distinguished from legacies, 403.
- of rents and profits as authorizing sale, 406.

DISCHARGE OF EXECUTOR AND ADMINISTRATOR,

- none at common law, liability continuing, 573.
- resignation and removal, 258, 573.
- modern statutes directing the discharge, 574.
- the final settlement as full discharge, 575.

DISTRIBUTION. See DESCENT AND DISTRIBUTION; ADVANCEMENTS.

- advance payments in distribution, 519.
- done under order of court, 548.
- refunding bond to secure speedy distribution, 557.
- order of distribution parties to, 558.
- parties to, 558.
- its conclusiveness, 559.
- nature and scope of, 559.
- payment to distributee's assignee, 560.
- set-off to legacies and distributee's shares, 561.
- distribution of personalty by law of domicil, 562.
- deceased distributee's share to his administrator, 564.
- posthumous and pretermitted children, 565.
- distribution without administration, 566.
- partial and premature distribution, 567.
- enforcement of order, 561, 570.
- unclaimed shares, disposition of, 571.

DIVIDENDS.

- extraordinary between life tenant and remaindermen, 456.

DOMICIL,

- what constitutes, 189.

DOMICILIARY AND ANCILLARY JURISDICTION, Chapter XVII.

- no administration has authority outside of appointing state, 155.
- administration in each state where property lies, 156.
- jurisdiction over property removed from one country to another, 157, 160.

See FOREIGN EXECUTOR AND ADMINISTRATOR.

- distribution under domiciliary law, 164.
- the ancillary court secures equality to its citizens, 164.

DONATIONES MORTIS CAUSA, Chapter VII.

- definition of term, 56.
- apprehension of death, 57.
- what property can be given, 58.

[References are to Sections]

DONATIONES MORTIS CAUSA — *Continued.*

- parting with control, 59.
- delivery to third person, 60.
- revocation by donor's, act, 61.
- by donor's recovery, or by donee's death, 62.
- validity against donor's creditors, 63.
- against donor's surviving family, 64.
- subject to succession tax, 320.

DOWER,

- discussed, Chapter XI.
- as affecting homestead, 100.
- in personalty, 111.

See ELECTION.

- in partnership realty, 123.
- emblems on dower land, 269.
- sale of land for debts subject to dower, 484.

E.

ECCLESIASTICAL COURTS,

- their origin, 133, 134.
- their powers, 135.
- gradual limitation of their powers in England, 136.
- accounting in, 498.

ELECTION,

- between homestead and dower, 100.
- between provisional alimony and marriage settlement, 86.
- between dower and devise, 112.
- between dower and widow's statutory share, 112.
- where will assures disposal of beneficiary's property, 461.

EMBLEMENTS,

- to executor as against heir, 269.
- on dower land, 269.

ENCUMBRANCES. See MORTGAGES AND COLLATERAL SECURITY.

EQUITABLE ASSETS,

- what are, 301, 482.

EQUITABLE CONVERSION. See CONSTRUCTIVE CONVERSION.

ESCHEATS, Chapter XIII.

- its technical meaning, 125.
- now merely signifies that state is "*ultimus heres*," 126.
- necessity for inquest of office, 127.
- escheator, 128.
- escheated estates remain subject to trusts, 129.
- subsequent recovery by heir from state, 130.
- administration where there are no known heirs, 131.
- unclaimed legacies and distributive shares, 571.

EVIDENCE. See WITNESSES, DECLARATIONS, ADMISSIONS; PRESUMPTIONS.

- judgment against administrator as evidence against his sureties, 238.
- execution of writing by deceased need not be denied under oath, 385.

[References are to Sections]

EVIDENCE — *Continued.*

extrinsic evidence in construing will, 413.
 in support of final settlement, 539.

EXECUTOR,

distinguished from administrator, 167.
for matters common to EXECUTORS AND ADMINISTRATORS, see that title
 when title vests, 168.
 executor's executor as successor to original executorship, 173, 342.
 his acts before grant of letters, 178.
 constructive appointment in will, 212.
 constructive powers in will, 333.
 testator's delegation of power to appoint, 212.
 qualifications as affected by residence, 213.
 qualifications as affected by infancy, 214.
 qualifications as affected by coverture, 215.
 qualifications as affected by mental or moral defects, 216.
 corporations as executors, 216.
 acceptance or refusal of office, 217.
 not required to give bond at common law, 233.
 when court can order him to give bond, 234.

See POWERS OF EXECUTORS UNDER WILL.

EXECUTORS AND ADMINISTRATORS,

for matters peculiar to executors, see EXECUTOR.
 for matters peculiar to administrators, see ADMINISTRATOR.
 do not take realty at common law, 3.
 power over realty in modern law, 4, 5.
 surviving partners administering on partnership, Chapter XII.
 priority, see PRIORITY AMONG EXECUTORS AND ADMINISTRATORS.
 their title is in *auter droit*, 170.
 validity of acts when the appointment void, and when voidable, 259.
 sue to set aside fraudulent conveyances of deceased, 286.
 what actions accrue in personal, and what in representative capacity,
 293.
 their liability for property of third persons claimed as assets, 294.
 accountability for assets in foreign jurisdictions, 297.
 liability for estate property lost through negligence, 298.
 debts to deceased of personal representative, 299.
 duty to file inventory, 303.
 duty to take possession of property, 309.
 when property in foreign jurisdiction, 309.
 title paramount to that of beneficiaries of estates, 310.
 duty to prosecute and defend actions for and against deceased, 311.
 duty to bring suits in interest of estate, 312.
 power to compound with debtors, 314.
 power to submit to arbitration, 315.
 duties as to contracts of deceased, 317.
 carrying on business of deceased, 317.
 voting stock of deceased, 317.
 expenses of preservation of property, 318.

See EXPENSES OF ADMINISTRATION.

See SALE OF PERSONAL PROPERTY.

[References are to Sections]

EXECUTORS AND ADMINISTRATORS — *Continued.*

- purchase at own sale, 326.
 - investment and custody of funds, 328.
 - measure of liability for negligence, 328.
 - duties when in charge of real estate, 337.
 - allowing claims, 378.
 - duty to invoke statute of non-claim, 390.
 - assent to legacies, 450.
 - purchaser at own sale voidable, 487.
 - charged with compound interest as penalty, 507.
 - official liability for rents collected without authority, 511.
 - recovery for overpayment to creditor, 520.
 - commissions of, see COMPENSATION OF EXECUTORS AND ADMINISTRATORS.
 - accountability for assets recovered in foreign jurisdiction, 536.
 - discharge of, see DISCHARGE OF EXECUTORS AND ADMINISTRATOR.
- EXECUTOR DE SON TORT**, Chapter XXI.
- little need of doctrine under modern statutes, 180.
 - how constituted, 181.
 - his liability, 182.
 - effect of appointment on prior acts, 183.

EXECUTORY DEVICES,

- what they are, 433.

EXHIBITION OF CLAIMS AGAINST ESTATE,

- subject discussed, Chapter XLI.
- its necessity, 374.
- what constitutes sufficient exhibition, 375.
- revival of action against deceased as exhibition, 375.
- time for, 376.

EXPECTANCY,

- of heir assignable, 554.

EXPENSES OF ADMINISTRATION,

- for preservation of property, 318.
- redeeming from lien, 317.

See TAXES.

See SUCCESSION TAX.

- when direct enforcement against estate, 347.

See FUNERAL EXPENSES.

- expenses of last illness sometimes preferred to all debts, 351.
- when cost of litigation included, 352.
- what are proper expenditures, 512.

See COUNSEL FEES.

- disbursements in respect to real estate, 517.

F.**FAC-SIMILE**,

- probate of will in, 206.

FAILURE OF ISSUE,

- definite or indefinite, 420.

[References are to Sections]

FEDERAL COURTS,

- jurisdiction of, in probate matters, 154.
- in claims barred by statute of non-claim, 392.

FIDUCIARY RELATIONS,

- presumption of undue influence when bequest to fiduciary, 23.

FINAL SETTLEMENTS,

- only on giving statutory notice, 503.
- conclusive as to matters embraced therein, 504, 572.
- setting aside in probate court, 505.
- setting aside in chancery court, 506.
- compelling, 537.
- correcting errors by court, 538.
- evidence to support; vouchers, 539.
- exceptions to, 540.

See LIABILITY OF ESTATE AFTER FINAL SETTLEMENT.

FIXTURES,

- between heir and personal representative, 270.
- between devisee and personal representative, 271.
- between life tenant and remainderman, 272.

FOREIGN EXECUTOR AND ADMINISTRATOR,

- power outside of state only by comity, 158.
- statutes extending comity, 161.
- voluntary payments to them, 159.
- extra territorial validity of title once vested, 160.
- liability outside of state for assets, 164.
- liability for assets received out of state, 536.

FOREIGN WILLS,

- probate of, 209.

FRAUDULENT CONVEYANCES,

- suits to set aside, by whom brought, 286.

FUNERAL EXPENSES,

- debt of estate or incident of administration, 348.
- the amount allowed, 349.
- what items included, 350.

G.

GARNISHMENT,

- of personal representative as owing creditors or beneficiaries, 570.

GRANT OF LETTERS,

- in what sovereignty, 186.
- in what local jurisdiction, 186.
- when granted in wrong local jurisdiction, 186.

See NON-RESIDENTS.

- the petition for; its allegations, 247.
- notice to parties entitled to administer, 248.
- is *in rem*, 249.
- who can object to grant, 249.
- granted by clerk in vacation, 250.

[References are to Sections]

GRANT OF LETTERS—*Continued.*

- the oath of office, 251.
- grant void where court has no jurisdiction, 252.
- otherwise not collaterally assailable, 252.

H.

HEIRLOOMS,

- not personalty, 260.

HOLOGRAPHIC WILL, 39.

HOMESTEAD,

- discussed, Chapter X.
- as mere exemption or as estate, 97.
- property constituting, 98.
- the widow's right, 99.
 - affected by dower, 100.
- the right of minor children, 103.
- abandonment affecting homestead, 102.
- the right to sell, 101.
- affected by encumbrances, 104.
 - by testamentary provisions, 105.
 - by administration, 106.
- procedure for setting out, 107.
- not subject to succession tax, 320.

HOTCHPOT,

- what is, 549.

I.

IDIOTS,

- incapacity to make will, 16.

ILLEGITIMATE CHILDREN,

- participation in distribution, 74.

IMBECILITY,

- total and partial, 16.

IMPLICATION,

- appointment of executor, by 212.
- estate by, under wills, 410.

INCOME,

- restrictions on accumulation, 421.
- profits as part of life tenants estate, 455.

INFANTS,

- capacity to make will, 13.
- legacy, to whom payable, 460.
- when bond by final settlement, 503.

INHERITANCE TAX,

- discussed, 320.

IN REM,

- how far probate court proceedings are *in rem*, 144.
- the probate of the will, 200.

[References are to Sections]

IN REM — Continued.

- the grant of letters, 249.
- the order of distribution, 558.

INSANITY,

- testamentary capacity, 17.
- who are insane, 17.
- partial insanity, 17.
- presumptions as to sanity, 18.
- lucid intervals, 19.
- opinions of non-experts as to sanity, 20.

INSOLVENT ESTATES,

- special administration thereon in some states, 394.
- how estates are declared insolvent, 395.
- the procedure, 396.
- time within which demands must be presented, 397.

INSURANCE,

- as assets of estate, 295.
- premium as expense of administration, 318.

INTEREST,

- as assets, 296.
- on legacies, 457.
- when time of payment fixed by will, 458.
- on annuities, 459.
- charged administrator in account, 509.
- compounded as penalty, 509.
- on advances as credit to administrator, 523.

INVENTORY,

- office and necessity of, 303.
- within what time it must be filed, 304.
- what property must be inventoried, 305.
- includes realty, 305.
- court cannot compel putting of property into inventory, 305.
- particularizations in inventory, 306.
- indication of values, 307.

INVESTMENTS,

- ~ duties of personal representative as to, 328.

J.

JOINT PROPERTY,

- as assets, 262.
- as assets of partnership, 113.

JUDGMENTS,

- where *bona notabilia* for probate jurisdiction, 187.
- against administrator as rendering his sureties liable, 238.
- entered after death on prior verdict, 311.
- assent to judgment by personal representative, 312.
- when they have priority as claims against estate, 359.

[References are to Sections]

JURISDICTION OF PROBATE COURTS,

- discussed, Chapter XVI.
- over partnership estates, 123.
- no state gives all theoretical powers, 146.
- no powers to try issue between personal representative and outsider, 147.
- nor transfers of beneficiaries, 147, 560.
- nor liabilities arising to outsiders from administration, 148.
- claims against deceased, 149.
- powers necessarily implied, 150.
- construction of wills only so far as is necessary for distribution, 151.
- exclusive and concurrent jurisdiction, 153.

See GRANT OF LETTERS.

- to probate wills, 194.
- to allow claims, discussed, Chapter XLII.
- to order sale of realty, 463.
- to marshal assets, 496.
- over settlements, 501.
- to set aside final settlement, 506.
- in case after an appeal, 545.
- over advancements of realty, 551.
- in partition of realty, 568.

L.

LAPSE,

- of gift *causa mortis* by donee's death, 62.
- of testamentary gift by death of donee before testator, 428.
- death of one of a class, 428.
- statutory preservation of gift for issue of deceased donee, 429.
- death destroying contingent testamentary gifts, 430.
- devolution of void and of lapsed testamentary gifts, 431.
- as modified by statute, 432.

LEASEHOLD ESTATES,

- governed by *lex rei sitæ*, 165.
- as assets, 264.

LEGACIES,

- for matters in common with devises*, see LEGACIES AND DEVISES.
- distinguished from devises, 403.
- interest on, 457.
- when time of payment fixed by will, 458.
- set off to, 561.
- unclaimed, disposition of, 571.

LEGACIES AND DEVISES. See LAPSE; CONDITIONS TO LEGACIES AND DEVISES; ADEMPITION; SATISFACTION OF LEGACIES; LIABILITY OF ESTATE AFTER FINAL SETTLEMENT.

- contingent and vested distinguished, 430.
- remainders vested and contingent, 433.
- executory devises, 433.
- specific, demonstrative, general, and residuary distinguished, 441.
- cumulative, 442.

[References are to Sections]

LEGAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS.

construction of term in will, 415.

LETTERS TESTAMENTARY AND OF ADMINISTRATION. See GRANT OF LETTERS.

LIABILITY OF ESTATE AFTER FINAL SETTLEMENT,

subject discussed, Chapter LXIII.

of legatees and distributees at common law, 576.

of heirs and devisees at common law, 577.

of all beneficiaries under statutes, 578.

what creditors can assert right, 579.

extent of beneficiaries' liability, 580.

the creditors' form of remedy, 581.

beneficiaries' liability joint or several, 581.

liability of purchaser from heir or devisee, 581.

LIFE ESTATE,

power of disposal with, 433.

in chattels, with remainder, 453.

profits as part of life tenant's income, 455.

extraordinary dividends between life tenant and remainderman, 456.

LIMITATIONS. See STATUTE OF NON-CLAIM.

personal representative not bound to plead the general statute, 391.

does not run while no administration, 391.

on following trust funds in administrator's hands, 392.

set off to legacies and distributed shares not barred by, 561.

administrator plead to distributee's suit, 569.

LIVING PERSONS,

administration on estates of, 191.

LORD CAMPBELL ACTS. See DEATH AS FOUNDATION FOR CAUSE OF ACTION.

LOST WILLS,

probate of, 197, 204.

M.

MARRIAGE,

revocation of will by, 52, 53.

legacies and devises in restraint of, 440.

MARRIAGE SETTLEMENTS,

election between provisional alimony and marriage settlement, 86.

ante-nuptial settlements, 274.

post-nuptial settlements, 275.

MARRIED WOMEN,

power to make wills, 14.

at common law, 14.

in equity, 14.

under statutes, 14.

See MARRIAGE SETTLEMENTS.

See SEPARATE PROPERTY OF WIFE.

[References are to Sections]

MARRIED WOMEN — *Continued.*

- claims against estates of, 381.
- legacy, to whom payable, 460.

MARSHALLING ASSETS,

- order in which legacies and devises abate, 489.
- testamentary charge of debts on realty, 490.
- testamentary charge of legacy on realty, 491.
- charge of debt on land as exonerating specific legacies, 493.
- exoneration of mortgaged property, 494, 495.
- jurisdiction of probate courts to marshal assets, 496.

MASSES FOR THE DEAD,

- validity of bequests for, 427.

MORTGAGES AND COLLATERAL SECURITY,

- affected by provisional alimony, 87.
- affected by homestead, 104.
- as assets, 266.
- redemption by personal representative, 318.
- what amount proved against estate under equity rule, 398.
- what amount proved against estate under bankruptcy rule, 398.
- proceeding to establish lien independent of establishing debt against estate, 399.
- statutory suspension of right to foreclose lien, 399.
- mortgaged property exonerated by the will, 494, 495.

MORTMAIN. See RELIGIOUS PURPOSES.**N.****NEGOTIABLE PAPER,**

- where no personal representative of deceased holder at maturity, 316.
- method of protesting against deceased party to the paper, 316.

NEXT OF KIN,

- computation of relationship, 68.
- construction of terms in will, 415.

NON-CLAIM. See STATUTE OF NON-CLAIM.**NON-RESIDENTS,**

- jurisdiction over estates as determined by situs of property, 187.
See SITUS OF PROPERTY.
- who entitled to administration as non-resident's estate, 229.
- property of subject to succession tax, 320.

NOTICE,

- of grant of letters, its purpose and effect, 373.
- to administrator to establish claim, 386.
- distinguished from exhibition of claim, 386.
- to heirs of application for sale, 467.
- of sale of realty, 476.
- none, for settlement for predecessor with administrator d. b. n., 535.
- of appeal from probate court, 544.
- of order of distribution, 553.

[References are to Sections]

NUNC PRO TUNC,

entering judgments, 143.

NUNCUPATIVE WILLS,

to what extent allowed, 40.

their formalities, 41.

sailor's and soldier's wills, 42.

O.

OATH,

to petition for grant of letters, 247.

of office of executor and administrator, 251.

of creditor to claim, 377.

of personal representative on sale of realty, 473.

to settlements of personal representative, 539.

ORDER TO PAY DEBTS,

when made, 401.

is personal judgment against personal representative, 401.

enforcement of the order, 402.

OWELTY, 568.

P.

PARAPHERNALIA, 277.

PARTIAL DISTRIBUTION,

how made, 567.

PARTITION,

of realty in probate court, 568.

PARTNERSHIP ESTATES,

discussed, Chapter XII.

at law, the title to firm property in survivors, 113.

at law, survivors alone liable to firm creditors, 113.

in equity surviving partner is trustee, 114.

survivor's right to prefer among creditors, 115.

survivors continue firm business at their risk, 116.

no notice of firm dissolution by death required, 116.

continuance of firm business by direction of deceased, 117.

firm creditor's equitable remedy against estate of deceased, 118.

creditors of deceased have no remedies against surviving partners, 119.

representative of deceased can demand accounting, 119.

final distribution of partnership estate, 120.

the good will of the firm, 121.

the realty of the partnership, 122.

the widow's dower in partnership realty, 122.

administration of partnership under Missouri law, 123.

PATENTS,

go to personal representative, 289.

PAYMENTS OF DEBTS,

to foreign administrator, 159.

[References are to Sections]

PAYMENTS OF DEBTS — *Continued.*

right of personal representative to make preferences at common law, 365.

creditors' bill destroying right to prefer, 365.

See RETAINER.

contingent claims as defence to distributee's demand, 367.

defences against claims at common law, 368.

judgment *de bonis testatoris* at common law, 368.

how made personal at common law, 370.

liability of personal representative in equity, 371.

modern statutory systems contrasted with common law, 372.

See NOTICE OF GRANT OF LETTERS.

See EXHIBITION OF CLAIMS AGAINST ESTATE.

allowance by personal representative, 378.

court order of payment as protection against later claims, 393.

See ORDER TO PAY DEBTS.

allowance gives no right till order of payment, 400.

administrator's right to recover overpayment, 520.

See LIABILITY OF ESTATE AFTER FINAL SETTLEMENT.

PERISHABLE PROPERTY,

sale by personal representative, 323.

life estate in, with remainder over, 453.

PERPETUITIES,

the rule against, 420.

PIN-MONEY, 276.

PLENE ADMINISTRAVIT,

plea of, at common law, 368.

POSTHUMOUS CHILDREN,

share in distribution, 72, 565.

POST-NUPTIAL SETTLEMENTS. See MARRIAGE SETTLEMENTS.

POWERS OF EXECUTORS UNDER WILL,

to donees personally or qua executor, 333, 334.

statutory changes, 335.

to sell, as including power to mortgage, 338.

to sell for debts, 464.

to raise fund out of rents as authorizing mortgage, 492.

PRECATORY TRUSTS,

in wills, 409.

PRESUMPTIONS,

as to seaman's will, 24.

against legacy to fiduciary, 23.

that devise is in addition to dower, 112.

as to testator's sanity, 18.

as to death, 190, 460.

as to survivorship, 190.

against claims of relations as creditors, 384.

legacy presumed in satisfaction of debt, 444.

gift to child before death presumed ademption, 445.

of advancement, rather than gift, or loan, 553.

[References are to Sections]

PRETERMITTED CHILDREN,

take share as in intestacy, 565.

PRIORITY AMONG DECEDENT'S DEBTS,

at common law, 354.

funeral and last illness, 355.

debts due United States, 356.

debts due the state and municipalities, 357.

debts owing in fiduciary capacity, 358.

judgments against decedent, 359.

debts by specialty, 360.

rent, 361.

wages, 362.

debts proved after a fixed statutory period as inferior class, 363, 393.

PRIVITY BETWEEN EXECUTORS AND ADMINISTRATORS,

when in different states, 156.

between co-executors or co-administrators, 333-340.

PRIVITY BETWEEN SUCCESSIVE ADMINISTRATIONS,

how far a later administrator bound by acts of a prior, 345.

the relation between an administrator d. b. n. and his predecessor, 343, 344.

PROBATE COURTS,

their functions as distinguished from those of other courts, 6.

See ECCLESIASTICAL COURTS.

origin of probate courts in America, 137.

all their powers derived from statute, 138.

are they courts of record, 139, 140.

the conclusiveness of their judgments in collateral proceedings, 141.

they have full powers over their judgments during the term, 142.

thereafter they correct, *nunc pro tunc*, only by matters of record, 143.intervening rights protected in *nunc pro tunc* entries, 143.how far these courts act *in rem*, 144.

pleading and practice in probate courts, 145.

See JURISDICTION OF PROBATE COURTS.

See APPEALS FROM PROBATE COURTS.

power in case after appeal, 545.

PROBATE OF WILLS,

its necessity, 193.

in what courts made, 194.

within what time it must be done; and within what time permitted, 195.

proof in common form, 196, 198.

proof in solemn form, 196, 199.

See CONTEST OF WILLS.

See LOST WILLS.

proof when attesting witness not accessible, 201.

proof of will in part, 205.

in facsimile, 206.

establishing will already proved in foreign jurisdiction, 209.

conclusiveness of probate, 211.

how far it leaves interpretation open, 211.

[References are to Sections]

- PROCEDURE IN PROBATE COURTS,
of pleadings and trials, 145.
- PROCEEDS OF SALE OF REALTY,
excess after satisfying claims, 482.
- PROFITS,
as part of life tenant's income, 455.
- PROMISE OF PERSONAL REPRESENTATIVE,
as binding estate, 369.
- PROMISSORY NOTES. See NEGOTIABLE PAPER.
- PROPERTY,
its nature, and its devolution on owner's death, 1.
See SITUS OF PROPERTY.
See ASSETS.
corpse not property, 261.
control of the grave, 261.
See SEPARATE PROPERTY OF WIFE.
expenses for preservation by personal representative, 318.
See SALE OF PERSONAL PROPERTY.
See REALTY.
- PROTEST. See NEGOTIABLE PAPER.
- PROVISIONAL ALIMONY FOR WIDOW AND CHILDREN,
Chapter IX.
how affected by gifts *mortis causa*, 64.
its nature and mode of allowance, 79, 80.
its amount, 81, 82.
as influenced by insolvency, 83.
by amount of widow's separate property, 84.
by testamentary provisions, 85.
by marriage settlement, 86.
by prior liens, 87.
when it takes effect, 88.
who can take, 89-91.
out of what property, 92.
time of claim, 93.
additional allowance, 94.
has priority over creditors, 353.
distinguished from distributive share, 353.
when administrator takes credit for, 518.
- PUBLIC ADMINISTRATOR,
the nature of the office, 174.
his right to take administration, 223.
- PURCHASE MONEY,
on sale of realty to pay debts, 480.
- PURCHASER OF REALTY AT ADMINISTRATOR'S SALE,
liability for incumbrances, 483.
liability to dowress and homestead tenant, 484.
certat emptor applied, 485.
his rights in equity, 486.
executors and administrators as purchasers, 487.

R.

REALTY, See SALE OF REAL ESTATE.

- power to devise at common law, 10.
- will disposing only of realty owned at its date, 50, 411.
- partnership realty, 122.
- realty descends by *lex rei sitæ*, 165.
- what is realty determined by *lex rei sitæ*, 165.
- realty descends to heir, 3, 177, 263.
- statutory modifications of the rule, 329, 331.
- charged with payment of debts under will, 449.
- disbursement as to allowed administrator, 517.
- partition in probate court, 568.

REFUNDING BONDS,

- to secure speedy distribution, 557, 567.

RELATIONS,

- construction of term in will, 415.

RELATIVES OF DECEASED,

- claims against estate, 385.

RELIGIOUS PURPOSES,

- doctrine of superstitious uses abolished, 416.
- common law doctrine as to mortmain abolished, 417.
- statutory restrictions of power to will for charity, 417.
- See MASSES FOR THE DEAD.
- gift; conditioned on religious qualification, 437.

REMAINDERS,

- vested and contingent, 433.
- after life estate with powers of disposal, 433.
- life estate in chattels with remainder, 453.
- extraordinary dividends between life tenant and remainderman, 456.

REMOVAL OF EXECUTORS AND ADMINISTRATORS,

- by court for cause, 258.

RENT CHARGE,

- when it goes to personal representative, 287.

RENTS,

- when they go to personal representative, and when with title to realty, 290.
- apportionment between life tenant and remainderman, 291.
- as assets, 296.
- to heir or devisee until sale under power, 337.
- a claim entitled to priority, 361.
- when administrator chargeable with, 511.
- official liability for rents collected without authority, 511.

RENUNCIATION,

- by executor, 217.
- of right to administer, 226, 227.

REPORT OF SALE,

- of realty, 479.

[References are to Sections]

REPRESENTATION,

- how far it extends under statutes, 69.
- when relatives take per capita and when per stirpes, 69.
- when advancement to parent charged against his child, 552.

RESIDENCE. See **DOMICIL.****RESIDUE,**

- to executor at common law, 462.
- as now disposed of, 462.

RESIGNATION OF EXECUTORS AND ADMINISTRATORS,

- power of court to accept, 258, 573.

RESTRAINT OF ALIENATION,

- how far permitted, 435.
- in charitable uses, 425.

RETAINER,

- right of personal representative to retain, 366.
- under modern statutes, 384.

REVIVAL OF ACTIONS,

- in name of personal representative, 311.
- as exhibition of claims, 375.

REVOCATION OF LETTERS, Chapter XXIX.

- jurisdiction usually only in probate court, 253.
- of void and voidable grant of letters, 254, 259.
- discretion of court in revoking, 255.
- causes for revocation, 255, 256.
- who may move for revocation, 257.
- immediately ends powers of persons removed, 259.

REVOCATION OF PROBATE OF WILL, 210.**REVOCATION OF WILLS BY TESTATOR,** Chapter VI.

- by cancelling, etc., 45.
- partial revocation by cancelling, 47.
- dependent relative revocation, 46.
- by subsequent will, 48.
- revival of prior by revocation of later will, 49.
- by inconsistent disposition of property, 51.
- by marriage of femme sole, 52.
- by marriage of male and birth of issue, 53.
- by failure to provide for issue, 54.

S.**SALE OF PERSONAL PROPERTY,**

- power of personal representative at common law, 321.
- under modern statutes, 322.
- of perishable property, 323.
- method and notice of sale, 324.
- terms and method of payment, 325.
- record and report of sale, 327.
- for distribution, 559.

[References are to Sections]

SALE OF REAL ESTATE,

varying extent of statutory powers, 330-332.

See **POWERS OF EXECUTORS UNDER WILL.**

for payment of debts, discussed, Chapter L.

jurisdiction of probate court to order, 463.

who may apply for order, 465.

within what time application may be made, 466.

notice to heirs of application, 467.

essentials of petition, 468.

proof of existence of debts, 469.

proof of insufficiency of personalty, 470.

what defences heir can make, 471.

what interest of decedent can be sold, 472.

bond and oath of personal representative, 473.

the order of sale, 474.

the sale and its consummation discussed, Chapter LI.

notice of, 476.

appraisement before sale, 477.

the sale itself, 478.

adjourning sale, 478.

report and confirmation of sale, 479.

payment of purchase money, 480.

the deed, 481.

excess of proceeds after satisfying claim, 482.

sale is subject to defects and incumbrances, 483.

sale is subject to dower and homestead, 484.

See **PURCHASER OF REALTY AT ADMINISTRATOR'S SALE.**

how far proceedings open to collateral attack, 488.

SANITY. See **INSANITY.**

the burden of proof on probate of will, 18.

the opinions of non-experts, 20, 203.

SATISFACTION OF LEGACIES,

preference of creditors over legatees, 448.

the order in which they abate, 449.

charge of debts on residuary realty and personalty, 449.

assent of executor, 450.

time for paying legacies, 451, 452.

legacies payable at future time by will, 451.

life estate in chattels with remainder, 453.

See **ANNUITIES.**

infant's, to whom payable, 460.

married woman's legacy, to whom payable, 460.

on legatee's presumptive death, 460.

See **MARSHALLING ASSETS.****SEAMAN'S WILL,**

presumption against beneficiaries, 24.

formalities, 42.

SEPARATE PROPERTY OF WIFE,

as influencing provisional alimony, 84.

her chattels real, 265.

See **MARRIAGE SETTLEMENT.**

[References are to Sections]

SEPARATE PROPERTY OF WIFE — *Continued.*

her chattels, 273.
pin-money; wife's earnings, 276.
paraphernalia, 277.
her choses in action, 292.

SERVANTS,

how contract affected by death of master, 288.

SET-OFF,

when it can be made to claim in probate, 387.
must be pleaded, 387.
to legacies and distributive shares, 561.

SETTLEMENTS. See ANNUAL SETTLEMENTS; FINAL SETTLEMENTS.

SHELLEY'S CASE,

the rule in, 415.

SITUS OF PROPERTY,

of realty, chattels, and choses in action as determining jurisdiction,
187.

SPECIALTIES,

as *bona notabilia*, 187.
priority as claims against estate, 359.

SPECIFIC LEGACIES,

what are, 441.
when they abate, 449.

SPENDTHRIFT TRUSTS,

their validity, 436.

STATUTE OF NON-CLAIM,

with reference to time of exhibition of claim, 389.
distinguished from general statute of limitations, 390.
duty of personal representative to invoke, 390.
what bars its running; and in whose favor, 392.
application in federal courts, 392.
subsequent claims subordinated, 393.

STOCK,

the personal representative voting, 317.
extraordinary dividends between life tenant and remainderman,
456.

SUBROGATION,

of parties compelled to pay decedent's debt, to the creditor's claims,
497.

SUCCESSION TAX,

discussed, 320.

SUMMARY PROCEEDINGS,

to recover assets, 313.
to enforce order for payment of debts, 402.
to enforce order of distribution, 570.

SUPERSTITIOUS USES. See RELIGIOUS PURPOSES.

[References are to Sections]

SURVIVAL OF ACTIONS,

- at common law, 278.
- when estate of deceased wrongdoer is benefited, 279.
- under modern statutes, 280.
- injuries to personalty, 281.
- actions concerning realty, 282.
- injuries to the person or character, 283.
- injuries resulting in death, 284, 285.
- fraudulent conveyances of deceased, 286.
- annuities and rent charges, 287.

SURVIVORSHIP,

- presumption as to, 190.

T.

TAXES ON PERSONALTY,

- as debt of estate or as expense of administration, 319.
- See CONFLICT OF LAWS.

TESTAMENTARY CAPACITY, 11, 15-25. See ALIENS; INFANTS;

MARRIED WOMEN; IDIOTS; INSANITY; UNDUE INFLUENCE.

- degree of mental vigor required, 15.
- restrictions as to gifts for charity, 417.

TESTAMENTARY CLASSES,

- gifts to, when they vest, and who included, 414.
- death of one of a class before testator, 428.

TRADE,

- of deceased carried on by personal representative, 317.

TRADE MARKS,

- go to personal representative, 289.

TRANSFER OF PERSONAL PROPERTY. See SALE OF PERSONAL PROPERTY.

TRUST FUNDS,

- when administrator is officially liable for, 294.
- when claimant must prove as general creditor, 392.

U.

UNCLAIMED LEGACIES AND DISTRIBUTIVE SHARES,
disposition of, 571.

UNDUE INFLUENCE,

- invalidating wills, 21.
- what constitutes, 22.
- avoiding portions of will, 25.

UNITED STATES,

- priority for debts due the government, 356.

UNITED STATES COURTS. See FEDERAL COURTS.

V.

VENDOR'S LIEN,
as asset, 266.

VESTED LEGACIES AND DEVISES,
distinguished from contingent, 430.

VOID LEGACIES AND DEVISES,
their devolution as distinguished from lapsed testamentary gifts, 431.

W.

WAGES,
as claim entitled to priority, 362.

WAIVER. See RENUNCIATION.

WIDOW,
her distributive share not affected by remarriage, 563.

WILD'S CASE,
rule in, 415.

WILLS,
property disposable by, under Roman and English law, 9.
of realty at common law, 10.
of uses in equity, 10.
See TESTAMENTARY CAPACITY.
form, execution, and attestation, Chapter V.
distinguished from present conveyance of future interest, 27.
conditional wills, 28.
joint and mutual wills, 29, 30.
wills in pursuance of contract, 31, 32.
no particular formality as to contents, 33.
or language, or writing material, 34.
the signature, 35.
the attestation, 36.

See ATTESTING WITNESSES.
change in law as to testamentary formalities, 37.
holographic wills, 39.
papers referred to in will as part thereof, 205.

See NUNCUPATIVE WILLS.

See CODICILS.

See REVOCATION OF WILLS BY TESTATOR.

See CONSTRUCTION OF WILLS.

See PROBATE OF WILLS.

WITNESSES,
opinion of non-expert as to sanity, 20, 203.
legatees and heirs as to testators' capacity, 202.
claimant as witness to prove claim, 388.

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